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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE NATIONAL FEDERATION OF THE BLIND and DONALD J. MORRIS,

Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; JESSE BROWN, Secretary, Department of Veterans Affairs; JOHN T. FARRAR, Under Secretary for Health, Department of Veterans Affairs; MICHAEL B. PHAUP, Director, Veterans Affairs Medical Center; and MARYLAND DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Randolph-Sheppard arbitration panel convened under 20 U.S.C. § 107d-1 and proceeding pursuant to 20 U.S.C. § 107d-2 has the power to render an award remedying violations of the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.*, such that a Federal Court can and should enforce that award?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
SUMMARY OF THE NFB'S PETITION	2
STATEMENT	3
A. The National Federation of the Blind and its Charter	3
B. The Randolph-Sheppard Act	4
C. The Proceedings Below	7
THE IMPORTANCE OF THE QUESTION	9
REASONS FOR GRANTING THE PETITION	9
I. THE COURT OF APPEALS' INTERPRETATION OF 20 U.S.C. § 107d-1 CONFLICTS WITH DECISIONS FROM A NUMBER OF OTHER CIRCUIT COURTS OF APPEALS	10
A. The Court Below Acknowledges That Its Decision Is in Conflict With the *Weinberger* Decision From the District of Columbia	11
B. The Court of Appeals' Decision Below Conflicts With Decisions of Other Courts of Appeal and District Courts	13

TABLE OF CONTENTS—Continued

Page

II. THE DECISIONS OF BOTH THE DISTRICT COURT AND THE COURT OF APPEALS BELOW REVEAL A PROFOUND CONFUSION CONCERNING THE PURPOSE AND INTENDED APPLICATION OF § 107d-1 AND § 107d-2 16

III. THE DECISION OF THE COURT OF APPEALS BELOW IS ERRONEOUS 19

A. The Decision of the Court Below Creates a Constitutional Problem Where None Existed Before 20

B. The Legislative History of the Act Demonstrates That Congress and the Secretary of Education Intended Arbitration Panels Convened Under 20 U.S.C. § 107d-1 to Have Remedial Powers Enforceable in Court 23

C. The Close Affinity Between the Randolph-Sheppard Act and Labor Law Reinforces the Conclusion That Arbitration Panels Under the Act Were Intended to Have a Full Range of Remedial Responses Available to Them Which Are Enforceable in Court 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases	Page
Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982)	22
Armco Employees Independent Federation v. Armco Steel Co., 65 F.3d 492 (6th Cir. 1995)	28
Board of Regents v. Roth, 408 U.S. 564 (1972)	20
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986)	21
Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995), cert. denied, —— U.S. ——, 116 S.Ct. 711 (1996)	24
Committee of Blind Vendors v. District of Columbia, 736 F. Supp. 292 (D. D.C. 1990)	5, 11
Committee of Blind Vendors of the District of Columbia v. the District of Columbia, 28 F.3d 130 (D.C. Cir. 1994)	5, 11
Concrete Pipe & Product v. Construction Laborers Pension Trust, 508 U.S. 602 (1993)	21
Crane v. Hahlo, 258 U.S. 142 (1922)	21
Crooks v. Harrelson, 282 U.S. 55 (1930)	8
DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988)	22
Delaware Department of Health and Social Services v. United States Department of Education, 772 F.2d 1123 (3rd Cir. 1985)	*passim*
Devine v. White, 697 F.2d 421 (D.C. Cir. 1983)	28
Dr. Bonham's Case, 8 Co. Rep. 114a, 2 Brownl. 255, 77 Eng. Rep. 647 (C.P. 1610)	21
Fillinger v. Cleveland Society for the Blind, 587 F.2d 336 (6th Cir. 1978)	11
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)	3, 21, 22, 27
Georgia Department of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990)	10, 18, 19
Gibbes v. Zimmerman, 290 U.S. 326 (1933)	21
Goldberg v. Kelly, 397 U.S. 254 (1970)	20, 21
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981)	20
Hinton v. United States Department of Education, 700 F. Supp. 21 (E.D. Tenn. 1988)	11

TABLE OF AUTHORITIES—Continued

Page

Hortonville J.S.D., No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976) 21
Howe v. Bolger, 35 CCH EPD 34,822 (E.D. Wis. 1984) 11
In re Murchison, 349 U.S. 133 (1955) 21
International Association of Machinists v. Street, 367 U.S. 740 (1961) 22
La Vale Plaza v. Noonan, 378 F.2d 569 (3rd Cir. 1967) 28
Lehman v. Lycoming County, 458 U.S. 502 (1982) .. 9
Linkletter v. Walker, 381 U.S. 618 (1965) 13
Maryland State Department of Education v. United States Department of Veterans Affairs, 896 F. Supp. —— (D. Md. 1995) ..... *passim*
Maryland State Department of Education v. United States Department of Veterans Affairs, 98 F.3d 165 (4th Cir. 1996) ..... *passim*
Massachusetts Elected Committee of Blind Vendors v. Matava, 482 F. Supp. 1186 (D.C. Mass. 1980) .. 11
Mayer v. University of Minnesota, 940 F. Supp. 1474 (D. Minn. 1996) 25
McNabb v. United States Department of Education, 862 F.2d 681 (8th Cir. 1988) 11, 25
Minnesota Department of Jobs & Training v. Riley, 18 F.3d 606 (8th Cir. 1994) 11, 13, 14
Minnesota Department of Economic Security v. Riley, —— F.3d ——, 1997 WL 78402 (8th Cir. Feb. 26, 1997) 11, 14, 15
Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 22
National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978) 20
New York v. Saper, 336 U.S. 328 (1949) 20
New York v. United States Postal Service, 690 F. Supp. 1346 (S.D.N.Y. 1988) 11, 15, 16
Oklahoma v. Weinberger, 741 F.2d 290 (10th Cir. 1983) 11
Perry v. Sindermann, 408 U.S. 593 (1972) 20
Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Rothensies v. Electric Battery Co., 329 U.S. 296 (1946)	20
Seminole Tribe of Florida v. Florida, —— U.S. ——, 116 S.Ct. 1114 (1996)	25
Tennessee Department of Human Services v. United States Department of Education, 979 F.2d 1162 (6th Cir. 1992)	11
Texas State Commission for the Blind v. United States, 796 F.2d 400 (Fed. Cir. 1986)	4, 11, 15
Tumey v. Ohio, 273 U.S. 510 (1927)	21
United States v. Mississippi Vocational Rehabilitation for the Blind, 794 F. Supp. 1344 (S.D. Miss. 1992)	10
United States v. Mississippi Vocational Rehabilitation for the Blind, 812 F. Supp. 85 (S.D. Miss. 1992)	10
United States v. Ruzicka, 329 U.S. 287 (1946)	13, 20
United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)	28
United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960)	27
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	21
Welch v. Texas Department of Highways and Public Transportation, 483 U.S. 468 (1987)	25
Constitutional Provisions	
U.S. Const. amend. V	20
U.S. Const. amend. XI	25
U.S. Const. amend. XIV	24
Statutes and Rules	
20 U.S.C. §§ 107-107f	4
20 U.S.C. § 107a	4, 5
20 U.S.C. § 107(a)	4
20 U.S.C. § 107b	27
20 U.S.C. § 107(b)	5, 6, 8
20 U.S.C. § 107b(a)	5
20 U.S.C. § 107b(6)	6, 26
20 U.S.C. § 107d-1(a)	*passim*
20 U.S.C. § 107d-1(b)	*passim*
20 U.S.C. § 107d-1 and § 107d-2	*passim*
20 U.S.C. § 107d-2(b)(2)	8, 12

TABLE OF AUTHORITIES—Continued

	Page
20 U.S.C. § 107d-3	5
20 U.S.C. § 107d-4	5
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1651	2
29 U.S.C. § 701, *et seq.*	3, 5, 23
42 U.S.C. § 12101(b)(4)	25
34 C.F.R. § 395.9(5)	26
34 C.F.R. § 395.4	27
34 C.F.R. § 395.6	27
34 C.F.R. § 395.7	27
34 C.F.R. § 395.11	27
34 C.F.R. § 395.30	26
34 C.F.R. § 395.31	26
Rehabilitation Act of 1973, as amended	*passim*
Americans With Disabilities Act of 1990	24, 25
Miscellaneous	
Fed. R. App. P. 40	2
Randolph-Sheppard Vending Stand Act of 1936, Ch. 638, 49 Stat. 1559 (1936)	4
Randolph-Sheppard Act Amendments of 1954, Pub. L. No. 83-565, Sec. 4, 68 Stat. 663 (1954)	4
1973 Hearings before the Subcommittee on the Handicapped on Labor and Public Welfare on S. 2581, 93rd Cong., 1st Sess. (1973)	4, 24
119 Cong. Rec. 34,082 (1973)	24
120 Cong. Rec. 36,853 (1974)	5
120 Cong. Rec. 35,712 (1974)	24
Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* (BNA 7th Ed. 1993)	9, 15, 16, 29
Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982)	10
Senate Report 93-937, 93rd Cong., 2nd Sess. 5 (1974)	4, 19, 23
S. 2581, 93rd Cong., 1st Sess. (1974)	24
Senate Report No. 93-1297, 1974 U.S.C.C.A.N. 6373	5
H.R. Rep. No. 1094, 74th Cong., 1st Sess. (1936)	4
Report to the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare by the Comptroller General of the United States, 93rd Cong., 1st Sess. (1973)	4

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PETITION FOR A WRIT OF CERTIORARI

The National Federation of the Blind and Donald J. Morris (collectively, the "NFB") respectfully petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals below (Maryland App., pp. 1a-14a)* is reported at 98 F.3d 165. The opin-

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* The NFB understands that the State of Maryland will also petition this Court for a Writ of Certiorari in the case at bar. The reference to the "Maryland App." is to the Appendix which the NFB expects the State of Maryland to file in connection with its Petition.

ion of the District Court below (Maryland App., pp. 17a-31a) is reported at 896 F. Supp. 513.

JURISDICTION

The Court of Appeals below entered its judgment on October 22, 1996 (Maryland App., p. 14a). Timely Motions for Rehearing pursuant to Fed. R. App. P. 40 were filed on November 4, 1996. Those Motions were denied by the Court of Appeals below on December 31, 1996 (Maryland App., pp. 15a-16a). While the NFB appeared as an *Amicus Curiae* prior to October 22, 1996, pursuant to 28 U.S.C. § 1651 it filed a Motion to Intervene in this case on its own behalf and on behalf of a blind vendor in the State of Maryland, Donald J. Morris, on November 4, 1996. That Motion was granted by the Court of Appeals below on December 31, 1996 (Maryland App., pp. 15a-16a). The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Provisions which relate to this case, directly or indirectly, are the Fifth, Eleventh, and Fourteenth Amendments to the United States Constitution. The Statutes at issue in this case are 20 U.S.C. § 107d-1 and § 107d-2, which provide the exclusive remedy for violations of the Randolph-Sheppard Act, 20 U.S.C. § 107, *et. seq.*

SUMMARY OF THE NFB'S PETITION

In this case, the Courts below have determined that arbitration panels convened under 20 U.S.C. § 107d-1(b) to resolve disputes between state agencies, charged with protecting the rights of the blind under the Randolph-Sheppard Act, and federal property managers, are without power to make an award specifying and providing a judicially enforceable remedy for violations of the Act. The Court of Appeals below affirmed the District Court which held that such a panel "has no remedial powers whatsoever."[1] In so holding, the decision of the Court below

[1] 896 F. Supp. at 517; 98 F.3d at 168.

is in conflict with many other Federal Circuits and is in conflict with a number of precedents of this Court, including this Court's recent reiteration in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) of the ancient principle that " 'where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.' " *Id.* at 66. As a further result of the decision of the Court below, the Constitutional Law and Federal Law rights of the blind citizens of this Country have been gravely imperiled.

STATEMENT

A. The National Federation of the Blind and Its Charter

The goal of the NFB is to promote the general welfare of the blind, to assist the blind in their efforts to integrate themselves into society through training programs, and to change the social attitudes which tend to deny opportunity based on limited notions of what people who are blind can do.

The Constitution of the NFB provides, *inter alia,* that the purpose of the NFB is to move the blind from second class citizenship to first class citizenship. The NFB also seeks to insure that the blind learn self-sufficiency, and that they learn to treat blindness as a nuisance rather than as a life altering disability. The purpose of the NFB is to serve the interests of all the blind citizens in this Nation by eliminating barriers to equal employment and equal treatment through the concerted activity of blind people working on behalf of blind people. The NFB seeks to achieve its goals by means of a combination of education through literature and programs, and advocacy of blind rights whenever and wherever appropriate. The purpose and goals are consistent with the NFB's status as a disability rights advocacy organization under the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.,* provisions of which are directly at issue in the case at bar, and closely related laws such as the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, *et seq.*

B. The Randolph-Sheppard Act

The Randolph-Sheppard Vending Stand Act, 20 U.S.C. §§ 107-107f ("the Act") was first enacted in 1936. Ch. 638, 49 Stat. 1559 (1936). Its purpose was to provide employment opportunities on federal property to blind vendors, to afford them self-sufficiency, and to further federal rehabilitative efforts on their behalf. 20 U.S.C. § 107(a); H.R. Rep. No. 1094, 74th Cong., 1st Sess. 2 (1936); S. Rep. No. 93-937, 93rd Cong., 2nd Sess. 5 (1974).

The original Act was only moderately successful. Part of the problem was general apathy to the Act among the federal agencies. *Texas State Commission for the Blind v. United States*, 796 F.2d 400, 402 (Fed. Cir. 1986). In addition, civilian employee welfare and recreation groups of certain federal agencies were being permitted by federal agencies to place vending machines in federal buildings to finance the activities of such groups. *Id.* The competition from these machines diverted income from blind vendors and made the establishment of new blind vending stands economically unattractive. *Id.*

In 1954, Congress amended the Act to make it more effective by mandating that blind vendors be given a "preference," so far as feasible, in establishing new blind vending stands on federal property and by authorizing the heads of federal agencies to assign vending machine income to blind vendors with whom non-blind vending machines directly competed in order to assure such a preference. Pub. L. No. 83-565, Sec. 4, 68 Stat. 663 (1954).

Largely because of what the Comptroller General of the United States identified in 1973 as widespread abuses of the blind vendor program by a number of federal agencies, the Act was further amended in 1974. *Report to the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare by the Comptroller General of the United States*, pp. 25 to 50, included in the Transcript of the *1973 Hearings before the SubCommittee on the Handicapped on Labor and Public Welfare on S. 2581*,

93rd Cong., 1st Sess. (1973) [in the record below as an appendix to the Brief *Amicus Curiae* of the NFB, filed with the Court of Appeals below on October 21, 1995]. By a nearly unanimous vote, Congress passed the 1974 Amendments to the Act by a vote of 398 to 7 in the House, and by a vote of 90 to 1 in the Senate. 120 Cong. Rec. 36,853 (1974); *Senate Report No. 93-1297*, 1974 U.S.C.C.A.N. 6373.

The 1974 Amendments to the Act authorize blind persons to operate vending facilities on federal property, and require that blind vendors licensed under the Act are to be given *priority* to operate such facilities. 20 U.S.C. § 107(b). Once a blind vendor becomes licensed to operate a facility, the vendor is assigned a vending stand to operate as a sole proprietor, and the vendor is given an initial stock of inventory and a petty cash fund. 20 U.S.C. § 107b(2). Thereafter, the vendor is entitled to profits and is responsible for losses and operating expenses, including the replacement of inventory and the payment of sales tax. *Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 736 F.Supp. 292, 297 (D. D.C. 1990), *rev'd on other grounds*, 28 F.3d 130 (D.C. Cir. 1994).

The states, through their rehabilitation agencies established pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, are responsible for the training (20 U.S.C. § 107d-4), licensing and placing of blind vendors on federal property (20 U.S.C. § 107a), and thereafter for securing the work environment of blind vendors while working on federal property. 20 U.S.C. § 107d-3. For the purposes of the Randolph-Sheppard Act, those state rehabilitation agencies are known as "state licensing agencies," or "SLAs." *Committee of Blind Vendors*, 736 F.Supp. at 296.

Any limitation on the placement or operation of a vending facility on federal property based on a finding by a federal property manager that such placement or operation would adversely affect the interests of the United States

"shall be fully justified in writing to the Secretary [of Education], who shall determine whether such limitation is justified." 20 U.S.C. § 107(b).

Each SLA is required "to provide to any blind licensee dissatisfied with *any action arising from the operation or administration of the vending facility program* an opportunity for a *fair hearing*, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title [Emphasis supplied]." 20 U.S.C. § 107b(6).

20 U.S.C. § 107d-1 and § 107d-2, which control arbitrations under the Act, are the statutes at issue in the case at bar. Section 107d-1(a) provides in pertinent part that "any blind licensee dissatisfied with *any action arising from the operation or administration of the vending facility program* . . . [Emphasis supplied]" has the right to have his grievance submitted to final and binding arbitration, but the blind licensee is only permitted to directly arbitrate his grievances with the relevant SLA. *Id.* Section 107d-1(b) provides in pertinent part that "whenever any [SLA] determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the Act . . .," then in that event the SLA may seek to have the action of the federal property manager corrected by means of final and binding arbitration. *Id.* Section 107d-2 details the procedures which are to be employed in convening and conducting the arbitrations called for under § 107d-1. By their terms, the provisions of 20 U.S.C. § 107d-1 and § 107d-2 provide the exclusive method of resolving any dispute arising under the Act.[2]

While blind vendors are not named as a party-plaintiff in any arbitration between an SLA and a federal property manager, courts have held that blind vendors, such as

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[2] The Court of Appeals for the District of Columbia also concluded that those provisions were the exclusive method of resolving disputes under the Act. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 102-103 (D.C. Cir. 1986).

Petitioner Morris herein,[8] are nonetheless third-party beneficiaries of the licensing agreements between the participating states under the Act and the federal government. *Delaware Department of Health and Social Services v. United States Department of Education*, 772 F.2d 1123, 1127 (3rd Cir. 1985).

C. The Proceedings Below

The NFB adopts the statement contained in the State of Maryland's Petition for a Writ of Certiorari in the case at bar, and incorporates same in this Petition as though set forth in full. The NFB wishes, however, to supplement Maryland's Statement with the following from the Record below.

The allocation of even 250 square feet of space for a blind vending facility at the VAMC was unacceptable to the Department of Veterans Affairs ("DVA") and the Veterans Canteen Service ("VCS"), a part of the DVA (J.A. 59-71), at the time of the evidentiary hearing before the § 107d-1(b) arbitration panel below. The acting chief of staff of the VAMC testified that "it would be over my dead body [that] they expanded" space for the canteen at the VAMC in order to accommodate a blind vending stand (J.A. 64-65). Because the DVA and the VCS had argued that there was no space available at the VAMC for a blind vendor facility, the arbitration panel ordered the DVA to turn over operation of the retail store operated by the VCS (J.A. 29), which retail store occupies less than 1,000 square feet (J.A. 61-62).

After the MSDE sought enforcement of the arbitration award before the District Court below, and almost one year after the date the arbitration panel had set as a deadline for the submission of a proposed permit to the panel designating space for a blind vendor stand, the DVA filed with the District Court, on June 1, 1995, the Secretary of Veterans Affairs' acknowledgment that there

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[8] Petitioner Morris was the blind vendor who would have applied for a permit to operate a vending stand at the VAMC in this case.

were at least three spaces available for a blind vending facility at the VAMC (J.A. 205).

While the VCS concession facilities occupy about 20,000 square feet at the VAMC, the DVA on June 1, 1995, offered the MSDE between 277 and 570 square feet of space currently being utilized as storage closets, an offer which the MSDE declined on the grounds that the proposed sites could not provide a self-supporting income to a licensed blind vendor (J.A. 186-189).

The DVA never requested a determination from the Secretary of Education pursuant to 20 U.S.C. § 107(b) approving the DVA's attempted limitation on the placement and operation of a blind vending facility at the VAMC (J.A. 23; 53; 221, ¶ 14).

In response to the MSDE's argument that under the interpretation thus adopted by the Court of Appeals "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel," the Court of Appeals below acknowledged that such a result might occur but within the meaning of and in reliance on *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930), it would not be a result which is " 'so gross as to shock the general moral or common sense.' " *Maryland State Department of Education v. United States Department of Veterans Affairs*, 98 F.3d 165, 170 (4th Cir. 1996).

The Court of Appeals below acknowledges that its decision is in direct conflict with the decision of the Court of Appeals for the District of Columbia in *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986). *Id.* at 170. After questioning the analysis and reasoning of the *Weinberger* Court, the Court of Appeals below specifically and squarely refused to follow the decision in *Weinberger* in the following terms: "We believe that our interpretation of § 107d-2(b)(2) gives effect to all of the language of the provision and, therefore, decline to follow the District of Columbia Circuit's interpretation of § 107d-2(b)(2)." *Id.*

THE IMPORTANCE OF THE QUESTION

Because, as will be demonstrated *infra,* the Constitutional and other Federal rights of the blind citizens of this Nation are gravely imperiled by the decision of the Court of Appeals below under the only Act of Congress solely designated to protect those rights, an Act which has never been before this Court in its sixty-one year history,[4] the NFB respectfully but strenuously urges this Court to exercise its Certiorari Jurisdiction to resolve what has now become a sharp split among the Circuits concerning the meaning of 20 U.S.C. § 107d-1 and § 107d-2. A close study of the decisions of a number of Courts, including now the Court of Appeals below, further reveals that there is a great deal of confusion among the lower Federal Courts in this Nation in general concerning the proper application of 20 U.S.C. § 107d-1 and § 107d-2. The split among the Circuits in this Nation has percolated and the confusion concerning those provisions has persisted for a very considerable period of time, especially in view of the fact that the confusion and the split involve important questions of Constitutional Law and Federal Law critical to the rights of the blind of this Nation.

REASONS FOR GRANTING THE PETITION

The NFB recognizes that the United States Supreme Court is not primarily an error correcting Court. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* 162-164 (BNA 7th Ed. 1993). However, the Supreme Court often will grant Certiorari where the decisions of two or more Federal Courts of Appeals are in conflict and the conflict has percolated for a considerable period of time, therefore resulting in confusion among the lower courts concerning important issues of Constitutional Law or Federal Law. *Id.* at 168-193.

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[4] As this Court has said, where there is a question of importance not heretofore considered by this Court, and one over which the Circuits are divided, Certiorari may lie. *Lehman v. Lycoming County,* 458 U.S. 502, 507 (1982).

The existence of the clear split among the Circuits regarding the issue herein warrants the invocation of this Court's Certiorari Jurisdiction. The split has percolated in the courts below for a considerable period of time, and has fully and clearly illuminated the issue which is in vital need of resolution. Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982). Moreover, the issue at stake herein involves vital questions of Constitutional Law and Federal Law, as to which there have been confusing and differing judicial responses in no fewer than eight Federal Circuits.

I. THE COURT OF APPEALS' INTERPRETATION OF 20 U.S.C. § 107d-1 CONFLICTS WITH DECISIONS FROM A NUMBER OF OTHER CIRCUIT COURTS OF APPEALS

Courts of Appeals in eight Circuits, and District Courts sitting in two other Circuits, have undertaken efforts to interpret the powers of an arbitration panel convened pursuant to 20 U.S.C. § 107d-1 and reached different conclusions. The Court of Appeals below (the Fourth Circuit) and the Eleventh Circuit have held that an arbitration panel convened pursuant to § 107d-1 has no remedial powers whatsoever. *Maryland State Department of Education v. United States Department of Veterans Affairs*, 98 F.3d 165, 168 (4th Cir. 1996) (the Court below); and *Georgia Department of Health and Social Services v. Nash*, 915 F.2d 1482, 1492 (11th Cir. 1990).[5]

On the other hand, the D.C. Circuit, Third Circuit, Sixth Circuit, and the Eighth Circuit have held that such a panel has remedial powers which are enforceable in Federal Court. *Randolph-Sheppard Vendors of America*

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[5] *See also, Maryland State Department of Education v. United States Department of Veterans Affairs*, 896 F. Supp. 513, 517 (D. Md. 1995) (District Court below); *United States v. Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344 (S.D. Miss. 1992); *United States v. Mississippi Vocational Rehabilitation for the Blind*, 812 F. Supp. 85 (S.D. Miss. 1992).

v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986);[6] *Delaware Department of Health and Social Services*, 772 F.2d 1123 (3rd Cir. 1985); *Tennessee Department of Human Services v. United States Department of Education*, 979 F.2d 1162 (6th Cir. 1992); *cf. Fillinger v. Cleveland Society for the Blind*, 587 F.2d 336 (6th Cir. 1978); *McNabb v. United States Department of Education*, 862 F.2d 681 (8th Cir. 1988); *Minnesota Department of Jobs & Training v. Riley*, 18 F.3d 606 (8th Cir. 1994); and *Minnesota Department of Economic Security v. Riley*, —— F.3d ——, 1997 WL 78402 (8th Cir. Feb. 26, 1997).

Additionally, Courts in the Federal Circuit, Second Circuit, Sixth Circuit, and the Seventh Circuit have implicitly acknowledged the remedial powers of such an arbitration panel. *Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986);[7] *New York v. United States Postal Service*, 690 F. Supp. 1346 (S.D.N.Y. 1988); *Hinton v. United States Department of Education*, 700 F. Supp. 21 (E.D. Tenn. 1988); and *Howe v. Bolger*, 35 CCH EPD 34,822 (E.D. Wis. 1984).

A. The Court Below Acknowledges That Its Decision Is in Conflict With the *Weinberger* Decision From the District of Columbia

We begin with an analysis of the decision of the Court of Appeals below and the decision of the Court of Appeals for the D.C. Circuit in *Weinberger*. After acknowledging the existence of a difference of interpretation with the *Weinberger* Court, the Court of Appeals below concludes:

> As Maryland notes, the legislative history indicates that Congress enacted the remedial provisions of the Act [20 U.S.C. § 107d-1 and § 107d-2] to 'provide

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[6] *See also, Committee of Blind Vendors v. District of Columbia*, 736 F. Supp. 292 (D. D.C. 1990), *rev'd on other grounds*, 28 F.3d 130 (D.C. Cir. 1994); *Massachusetts Elected Committee of Blind Vendors v. Matava*, 482 F. Supp. 1186 (D.C. Mass. 1980).

[7] *See also, Oklahoma v. Weinberger*, 741 F.2d 290 (10th Cir. 1983).

> the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes . . .'. This legislative history does not, however, cast a shadow on our holding or the Eleventh Circuit's interpretation of § 107d-2(b)(2) in *Nash*. While the Senate Report indicates that Congress intended to provide a final resolution of disputes arising from the administration of the Act, it does not clearly express Congress' intent that the resolution of every facet of these disputes—that is, both the fact of a violation and the appropriate remedy—should lie with the arbitration panel. As indicated above, we read the plain language of the statute to require that the arbitration panel resolve the dispute as to whether the federal entity in question is in violation of the statute, while the responsibility for correcting the violation lies with the federal entity head. Nothing in the legislative history cited by Maryland suggests that this interpretation will produce a result 'demonstrably at odds with the intentions of [the Act's] drafters.'

Maryland, 98 F.3d at 171.

The NFB asks this Court to contrast the foregoing with the clear and forceful interpretation of 20 U.S.C. § 107d-1 and § 107d-2, and the Legislative History underlying those provisions, in the *Weinberger* decision:

> We first examine the scope of the arbitration requirement. In establishing the grievance and arbitration procedure, the Senate Committee reviewing the 1974 amendments to the Act stated that '[i]t is the expectation of the Committee that the arbitration and review procedures adopted . . . will provide the means by which aggrieved vendors and State agencies may obtain final and satisfactory resolution of disputes.' . . . The statutory language regarding state licensing agencies is equally explicit, providing that [*w*]*henever* any State licensing agency determines that any [federal agency] . . . is failing to comply with the provisions of this chapter or any regulations issued thereunder . . . such licensing agency may file a complaint with the Secretary who shall convene a panel to arbi-

> trate the dispute. . . .' For both a blind licensee and a state agency, an arbitration decision is 'final and binding on the parties except as otherwise provided in [the Act].' 20 U.S.C. Secs. 107d-1(a), (b). Finally, the Act provides for judicial review of the arbitration decision after 'final agency action.' 20 U.S.C. Sec. 107d-2(a). . . . Most telling as to Congress' intent, however, is its statement that an arbitration decision 'shall be subject to appeal and review as a final agency action.' 20 U.S.C. Sec. 107d-2(a). In contrast to de novo review, judicial review of final agency action is 'severely circumscribed,' requiring a reviewing court to determine whether a decision is within the ambit of the agency's discretion and supported by the record. . . . *Surely Congress contemplated that disputes betwen state agencies and government agencies could involve contract awards, such as the one at issue here. Congress nevertheless set up an arbitration scheme instead of authorizing direct resort to federal court. As Justice Brandeis stated the 'well settled' rule: 'where a statute creates a right and provides a special remedy, that remedy is exclusive.'* [Emphasis supplied].

Weinberger, 795 F.2d at 101-103.

The difference in the approach to the statutory construction of § 107d-1 and § 107d-2, and the resulting conclusions of the Court of Appeals below and the Court of Appeals for the District of Columbia could not be clearer. As Justice Frankfurter long ago suggested, the exercise of this Court's Certiorari Jurisdiction may be justified where the question at issue involves a matter of statutory construction or application which is of singular significance to the administration of an Act of Congress. *United States v. Ruzicka*, 329 U.S. 287, 288 (1946); *see also, Linkletter v. Walker*, 381 U.S. 618, 620 (1965).

B. The Court of Appeals' Decision Below Conflicts With Decisions of Other Courts of Appeal and District Courts

In *Minnesota Department of Jobs & Training v. Riley ("Riley I")*, 18 F.3d 606 (8th Cir. 1994), a case involving

the same defendant as the Respondent DVA in the case at bar, the VCS similarly refused to issue a permit, for different reasons, to the SLA. The SLA also filed a complaint with the Secretary of Education, and an *ad hoc* arbitration panel was convened. *Id.* at 608. The panel ruled in favor of the SLA, and the SLA then sought to enforce the resulting arbitration award in District Court. Unlike the case at bar, the District Court ordered enforcement through and by means of a summary judgment in favor of the SLA. *Id.* In upholding the District Court, the Court of Appeals in *Riley I* stated that, based on the plain language of the Randolph-Sheppard Act, "[t]he VCS must comply with the regulatory scheme for implementing blind vendor operations on VA property. Neither the Act nor the regulations permit the VCS to pick and choose which of the Act's governing regulations to follow." *Id.* at 609.

The Eighth Circuit Court of Appeals very recently issued yet another decision which, like *Riley I*, stands in direct opposition to the result reached in the Court of Appeals below. In *Minnesota Department of Economic Security v. Riley ("Riley II")*, —— F.3d ——, 1997 WL 78402 (8th Cir. Feb. 26, 1997), the Eighth Circuit was compelled to revisit once again the intransigence of the Respondent DVA. In language which at once demonstrates the split among the Eighth Circuit and the Court of Appeals below and also buttresses the contention that the split in the Circuits has percolated for a considerable period of time, the Eighth Circuit emphatically declared:

> In truth, the [DVA] has done far more than merely limit the blind vendor's operation at the VA Medical Center. Congress assumed federal agencies would respect a blind person's vending enterprise and willingly comply with the Act. . . . Instead, the [Veterans Administration] has tried to drive the blind vendor out of its domain. . . . Nine years later, the [Veterans Administration] is still at it, demanding the right to install machines that would, as the district court found, destroy the blind vendor's

> livelihood. It is time for the [Veterans Administration's] scorched-earth campaign to end.

1997 WL 78402 at *2.

Unlike the Court of Appeals below, the Court of Appeals for the Eighth Circuit in *Riley II* emphatically and unequivocally held: "The VCS is no different from any other steward of federal property. If the VCS wants to impose limitations on a blind vendor's operation, it must get permission from the Secretary of Education." *Id.* at *3.

Another case interpreting and applying 20 U.S.C. §107d-1(b) which implicitly reaches a strikingly different conclusion from that of the Court of Appeals below is *Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986). The facts and the holding of that case are not on all fours with the case at bar. However, the implicit acknowledgement by the *Texas* Court of the remedial powers of an arbitration panel convened under 20 U.S.C. § 107d-1(b) merits special attention. In *Texas*, the SLA sought funds from the Department of Defense under the income-sharing provisions of the Randolph-Sheppard Act. *Id.* at 402. A duly convened *ad hoc* arbitration panel under § 107d-1(b) awarded approximately ten million dollars to the SLA. *Id.* at 406. In the nearly thirty-page decision, containing a plurality opinion, one concurring opinion and two dissenting opinions, the ten Judges of the Federal Circuit painstakingly analyzed the Legislative History of the Randolph-Sheppard Act. While the award of the arbitration panel was set aside on other grounds, not once in that decision did any of the ten Judges of the Federal Circuit suggest that the arbitration panel was without authority to make the remedial award it did make.

While not of the same significance as conflicting decisions of the Courts of Appeal, Stern, Gressman, *et al.*, notes that Federal District Court decisions are relevant in the Certiorari context primarily as indicators of lower court confusion over an otherwise important question, or a question that gains importance from the very existence of such confusion. *Id.* at 180. In *State of New York v.*

United States Postal Service, 690 F. Supp. 1346 (S.D.N.Y. 1988), the Court adopted the reasoning of the D.C. Circuit in *Weinberger, supra.* In much the same way as had been done in *Weinberger,* the Court in *New York* stayed the effort of the SLA to obtain injunctive relief against a federal agency pending the exhaustion of administrative remedies before a Randolph-Sheppard arbitration panel. The Court there stated "[b]y enacting the arbitration provisions found in Secs. 107d-1(a) and (b), Congress clearly intended to establish a . . . scheme whereby disputes over the *substantive rights* contained in the Act could be resolved." [Emphasis supplied]. *Id.* at 1353.

II. THE DECISIONS OF BOTH THE DISTRICT COURT AND THE COURT OF APPEALS BELOW REVEAL A PROFOUND CONFUSION CONCERNING THE PURPOSE AND INTENDED APPLICATION OF § 107d-1 AND § 107d-2

One of the purposes of Certiorari Jurisdiction is to address lower court confusion "over an otherwise important question, or a question that gains importance from the very existence of such confusion." Stern, Gressman, *et al.*, *supra,* at 180.

Both § 107d-1 and § 107d-2, through and by final binding arbitration, provide the exclusive method of resolving all disputes arising under the Randolph-Sheppard Act either between a blind vendor and a state licensing agency (SLA) or between an SLA and a federal property manager, for the benefit of blind vendors.

20 U.S.C. § 107d-1 and § 107d-2 address two different types of disputes and contemplate two separate and distinct arbitrational mechanisms to resolve those disputes. 20 U.S.C. § 107d-1(a) is concerned with disputes arising under the Act between blind vendors and SLAs. 20 U.S.C. § 107d-1(b) is concerned with disputes arising under the Act btween SLAs and federal property managers, for the benefit of blind vendors. While both arbitration models are ultimately concerned with the rights of the blind, the parties under a § 107d-1(a) and a § 107d-

1(b) arbitration are different, and those sections are concerned with different types of disputes.

However, the District Court and the Court of Appeals below do not acknowledge that difference, and in fact perpetuate a confusion regarding that difference which has its primary genesis in the *Nash* decision. The issue in the case at bar relates to the remedial powers of an arbitration panel to resolve one type of dispute, *i.e.*, a dispute between an SLA and a federal property manager under 20 U.S.C. § 107d-1(b), for the benefit of blind vendors. The issue in *Nash* relates to the remedial powers of an arbitration panel to resolve the other type of dispute, *i.e.*, a dispute between a blind vendor and an SLA under 20 U.S.C. § 107d-1(a).

In the case at bar, involving a dispute between an SLA and a federal property manager, the District Court below, in reliance on *Nash*, refused to enforce the award of an arbitration panel convened pursuant to the Act in favor of the SLA in the State of Maryland against the Department of Veterans Affairs. *Maryland State Department of Education v. United States Department of Veterans Affairs*, 896 F.Supp. 513, 518 (D. Md. 1995). Based on *Nash*, the District Court further concluded that an arbitration panel convened pursuant to 20 U.S.C. § 107d-1(b) "has no remedial powers whatsoever." *Id.* at 517.

The Court of Appeals below affirmed the District Court and held that an award of an arbitration panel convened under the Act to resolve a dispute between an SLA and a federal property manager could not be enforced in Federal Court. *Maryland Department of Education v. United States Department of Veterans Affairs*, 98 F.3d 165, 168 (4th Cir. 1995). The Court below acknowledges that the Congress enacted 20 U.S.C. § 107d-1 and § 107d-2 "to provide the means by which aggrieved [blind] vendors and State agencies may obtain a final and satisfactory resolution of disputes (*Id.* at 171)." The Court nevertheless concludes that an arbitration panel convened under § 107d-1 (b) is limited to a determination of whether the federal entity is in compliance with the terms of the Act (*Id.* at

170), but vests the bestowing of a remedy and the power of correcting the violation exclusively with the federal agency which was found in violation of the Act by a duly convened arbitration panel. *Id.* According to the Court of Appeals below:

> [§ 107d-2(b)(2)] specifically grants the arbitration panel in [§ 107d-1] (b) cases [involving a dispute between a state licensing agency and a federal property manager] authority to decide whether the federal entity's acts "are in violation" of the Act. The provision, however, limits the panel's authority to that decision alone: although the panel may determine that a violation is occurring and may identify the discrete acts that are in violation, *the statute does not authorize the arbitration panel to order the federal entity to take any remedial action.* Rather, the statute expressly places the obligation of ending the violation on the federal entity itself. [Emphasis supplied].

Id. at 170.

Although only a § 107d-1(b) dispute was before them, both the District Court and the Court of Appeals below place heavy reliance on the Eleventh Circuit's decision in *Nash*. While it is true that the *Nash* majority discusses at length a § 107d-1(b) arbitration, that discussion has absolutely nothing to do with the dispute which was in fact at issue in *Nash, i.e.*, a dispute between a blind vendor and an SLA under § 107d-1(a). The error in the *Nash* majority's discussion of a § 107d-1(b) arbitration is explained in Judge Clark's scholarly and well-reasoned dissent in *Nash*. According to Judge Clark, the discussion by the *Nash* majority of what *might* happen in a § 107d-1(b) arbitration under the Act between an SLA and a federal property manager is hypothetical speculation which simply has nothing to do with the issue in *Nash*. *Id.* at 1501. That is, any statements by the *Nash* Court relative to the powers of an *ad hoc* arbitration panel in a dispute between an SLA and a federal property manager are *obiter dicta*. Thus, the reliance of the District Court and the Court of

Appeals below on the "holding" in *Nash* is at best confusing and at worst inappropriate.

III. THE DECISION OF THE COURT OF APPEALS BELOW IS ERRONEOUS

The result of the decision of the Court of Appeals below will be an endless series of advisory decisions by toothless arbitration panels. A recalcitrant federal agency can simply refuse to abide by arbitration panel determinations *ad infinitum*, with impunity. The Respondent DVA in the case at bar has already amply demonstrated a proclivity to recalcitrance in *Riley II*, *supra*. Under the decision below, SLAs will be helpless to obtain redress in Federal Court, regardless of how serious the violation of the Act. Congress' intent to create a mechanism for "prompt and satisfactory disposition of blind licensee and state agency complaints (*U.S. Senate Report No. 93-937*, p.20 (J.A. 157))" will be frustrated to the point of futility. Why should an SLA expend its resources in a cyclical, ever-endless effort to compel compliance with the Act, when blind licensees cannot force such an agency to act (*Nash*, 915 F.2d at 1489) and even a conscientious SLA, such as the one in the case at bar, is denied power to enforce compliance with arbitration panel awards? In other words, the decision of the Court of Appeals below may well encourage other SLAs, such as the one in *Nash*, to refuse to protect vigorously the rights of a blind vendor on federal property.

The inability to enforce § 107d-1 arbitration panel decisions carries with it significant implications for the civil rights of blind vendors which go far beyond the mere placement of vending facilities on federal property. The Court of Appeals below admits that a different statutory structure from the one that it perceived "may have been wiser." 98 F.3d at 170. In fact, leaving SLAs and thus their licensees without an effective means of enforcing requirements of the Act not only does offend "the general moral of common sense," *see id.* at 169-170, it is clearly contrary to the express will of Congress, considerably impedes the administration of the Act and rele-

gates the blind citizens of this Country to second class citizenship as they seek to pursue their rightful employment opportunities and related civil rights on federal property. This Court has exercised its Certiorari Jurisdiction in the past when the decisions of lower Courts have created a serious hindrance to the effective administration of an Act of Congress.[8] This Court has also demonstrated a willingness to exercise that Jurisdiction when the decisions of lower Courts imperil the Constitutional rights of a class of citizens.[9]

A. The Decision of the Court Below Creates a Constitutional Problem Where None Existed Before

By holding that the arbitration panel convened under 20 U.S.C. § 107d-1(b) cannot include a remedy in its award, enforceable in Court, but instead must limit itself to identifying the existence of a violation of the Act and leave to the head of the DVA the duty of remedying the violation, the Court of Appeals below creates a problem of significant Constitutional importance. By thus committing the adjudicative function of providing a remedy to one of the parties to the arbitration—the party who lost—the Due Process right to a neutral, disinterested decision maker has effectively been taken away from the SLA and, in particular, the blind citizens who are third-party beneficiaries of the relationship between the SLA and the federal agencies (*see, e.g., Delaware, supra,* 772 F.2d at 1127).

The Due Process clause of the Fifth Amendment applies in this case because the Randolph-Sheppard Act is a Federal Statute that creates a property interest entitled to Due Process protection. *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970). Like the wel-

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[8] *Rothensies v. Electric Battery Co.,* 329 U.S. 296 (1946); *United States v. Ruzicka,* 329 U.S. 287 (1946); *New York v. Saper,* 336 U.S. 328 (1949).

[9] *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 646, n.9 (1981); *National Broiler Marketing Assn. v. United States,* 436 U.S. 816, 820 (1978).

fare recipients in *Goldberg v. Kelly*, the blind vendors whose interests are being adjudicated in this case rely on the Randolph-Sheppard Act to provide "the means to obtain essential food, clothing, housing, and medical care." *Goldberg v. Kelly*, 397 U.S. at 264. In cases like this one, involving administrative proceedings as to persons who are entitled to federal and state benefits that are at risk, "an impartial decision maker is essential." *Id.* at 271.

Due Process requires a neutral and detached judge. *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Dr. Bonham's Case*, 8 Co. Rep. 114a, 2 Brown, 255, 77 Eng. Rep. 647 (C.P. 1610) (Coke, J.). The Constitutional command of a disinterested decision maker is no different when Congress delegates adjudicative functions to an arbitration panel. *Concrete Pipe & Product v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993); *see Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). A remedy is a part of an adjudication in a Constitutional sense, and a neutral decision maker is thus essential. Due Process requires a substantial right of redress by some effective, and efficient, remedy. *Gibbes v. Zimmerman*, 290 U.S. 326 (1933); *Crane v. Hahlo*, 258 U.S. 142 (1922); *cf. Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

The suggestion by the Court below (98 F.3d at 171) that the SLA can simply pursue another arbitration if the DVA does not conform itself to the Act (which it very probably will not, as is clear from *Riley II*, *supra*), will not cure the unconstitutional deprivation caused by the absence of a detached and disinterested decision maker in the first instance. *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972).

The head of the DVA is not the kind of ostensibly disinterested decision maker whose bias must be shown to exist before he is disqualified to sit as a decision maker. *See Hortonville J.S.D., No. 1 v. Hortonville Education*

Ass'n, 426 U.S. 482, 491-93 (1976). The head of the DVA is a party to the arbitration in the Court below and he is a party to the arbitration in both *Riley I* and *II*, *supra*. He has already taken a position adverse to the SLA in both cases, and as is clear from *Riley II*, *supra*, he is apparently very intent on disregarding the Randolph-Sheppard Act, instead of enforcing it.

There is another Constitutional problem created by the Court below. The decision of that Court, and the Court in *Nash*, effectively construes away a remedy provided by Congress, and this is most emphatically inconsistent with this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 66-67.

This Court has exercised its Certiorari Jurisdiction when the decision of a Court of Appeals below appears to misapply, disregard, or otherwise misconstrue precedents of this Court. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982).

Where an otherwise acceptable construction of a statute will raise Constitutional problems, this Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). The decisions of the other Courts of Appeals and District Courts which have addressed the Randolph-Sheppard Act have demonstrated that such a construction of the Act is "fairly possible," and that construction, *i.e.*, the one recognizing the remedial powers of an arbitration panel under § 107d-1, should be adopted by this Court. *International Association of Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.).

B. The Legislative History of the Act Demonstrates That Congress and the Secretary of Education Intended Arbitration Panels Convened Under 20 U.S.C. § 107d-1 to Have Remedial Powers Enforceable in Court

There is very strong evidence in the Legislative History underlying the Act that the Congress viewed the arbitration mechanism in the 1974 Amendments to be the functional equivalent of an adjudication. In *Senate Report 93-937* (J.A. 157), the Committee on Labor and Public Welfare stated as follows, in a section entitled "Arbitration and Judicial Review:"

> The bill creates two new sections of the Act which establish the machinery for a *grievance resolution procedure*. . . . The Committee considers the arbitration procedures contained in S. 2581 to be valuable tools for the *resolution of disputes.* Under current circumstances, machinery for *prompt and satisfactory disposition* of blind licensee and state agency *complaints* does not exist. . . . The Comptroller General's Report states that HEW and state agencies are still *without recourse* from decisions of federal agencies regarding blind vendor facilities on property they control. Moreover, *blind vendors have attempted to bring their grievances to the judicial system* for resolution. In the case *Wilson v. Blount,* for example, the U.S. District Court . . . held that the plaintiff blind vendor had no standing to challenge the legal basis of the decision of the Postmaster General. . . . *It is the expectation of the Committee that the arbitration and review procedures adopted in S. 2581 will provide the means by which aggrieved vendors and state agencies may obtain a final and satisfactory resolution of disputes.* [Emphasis supplied].

Id. at 20.

Moreover, the decision of the Court below fails to take account of the very close nexus which exists between the Randolph-Sheppard Act and the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* Originally, the 1974

Amendments to the Randolph-Sheppard Act were to be included (as apparently was the entire Randolph-Sheppard Act) as a sub-title of the Rehabilitation Act. What became the 1974 Amendments were in fact part of the proposed Rehabilitation Act of 1972. 119 Cong. Rec. 34,082 (1973). They were dropped from the Rehabilitation Act in 1973 because of a technicality. *Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2581*, 93rd Cong., 1st Sess. 21 (1974) [in the record below as an appendix to the Brief *Amicus Curiae* of the NFB, filed with the Court of Appeals below on October 21, 1995].

Because the 1974 Amendments to the Randolph-Sheppard Act were originally included as a separate title within the Rehabilitation Act of 1973, and later dropped solely due to a technicality, there can be no reason to believe that those Amendments should not be construed in the same manner in which the Rehabilitation Act of 1973 is construed. Additionally, the Legislative History of the Rehabilitation Act demonstrates that the Rehabilitation Act "in effect strengthens the Randolph-Sheppard Act and gives added protection to the blind." 120 Cong. Rec. 35,712 (1974). The Rehabilitation Act and the 1974 Amendments to the Randolph-Sheppard Act only tend to reinforce this interpretation. S. 2581, 93rd Cong., 1st Sess. 39 (1974) [in the record below as an appendix to the Brief *Amicus Curiae* of the NFB, filed with the Court of Appeals below on October 21, 1995].

The Americans with Disabilities Act of 1990 is to be judicially interpreted in the same manner as the Rehabilitation Act, because of their similar language and purpose. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 833, n. 3 (9th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 711 (1996). It is well recognized that both the ADA and the Rehabilitation Act were enacted by Congress pursuant to the Fourteenth Amendment to the United States Constitution, and thus do not fall within the proscription barring damage actions against the several

states under the Eleventh Amendment, established by this Court in *Seminole Tribe of Florida v. Florida*, —— U.S. ——, 116 S.Ct. 1114, 1125 (1996). The ADA specifically provides that its purpose is "to invoke the sweep of Congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities." 42 U.S.C. § 12101(b)(4); *see also, Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1480 (D. Minn. 1996). Similarly, this Court has recognized that the Rehabilitation Act was enacted by Congress under the Fourteenth Amendment. *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 472, n.2 (1987).

Although the Randolph-Sheppard Act is silent concerning the Constitutional basis upon which Congress enacted that Act, it can safely be concluded from the Legislative History of that Act (when coupled with the close nexus between it and the Rehabilitation Act of 1973 and the ADA) that the Randolph-Sheppard Act was similarly enacted pursuant to the Fourteenth Amendment. Thus, a Randolph-Sheppard Act arbitration panel convened pursuant to 20 U.S.C. § 107d-1(a) may properly award damages against a State, despite the Eleventh Amendment. *See, e.g., Delaware Department of Health and Social Services v. United States Department of Education, supra*, and *McNabb v. United States Department of Education, supra.* Since the Fourteenth Amendment is simply a vehicle by which to apply certain provisions of the Bill of Rights to the several States, *a fortiori* an arbitration panel convened pursuant to 20 U.S.C. § 107d-1(b) is also authorized to award damages or provide for other relief against federal agencies.

C. The Close Affinity Between the Randolph-Sheppard Act and Labor Law Reinforces the Conclusion That Arbitration Panels Under the Act Were Intended To Have a Full Range of Remedial Responses Available to Them Which Are Enforceable in Court

As noted *supra*, the Third Circuit Court of Appeals in *Delaware Department of Social Services* recognized the close affinity between the Randolph-Sheppard Act and Labor Law.

> The contractual relationship is both analogous to and different from the relationship resulting from a collective bargaining agreement or a single person employment contract. It is analogous because the participating state, like a typical employer, maintains a large degree of control over the activities of the vendor. . . . Nevertheless the relationship between the blind vendor and the state, like conventional employment relationships, is essentially contractual. The terms of the contract are standardized by virtue of the agreement between the participating states and the United States. Thus, since 1974 each blind vendor enjoys the benefit of the arbi -ation undertaking specified in 20 U.S.C. Sec. 107b(6).

772 F.2d at 1136.

As noted by the Court below, the Act is a labor and employment statute, enacted "to provid[e] blind persons opportunities, and assist them in becoming more self-supporting." 98 F.3d at 166. In fact, the structure of the Act, and particularly the Secretary of Education's regulations, share a number of characteristics in common with federal labor law.[10] It therefore is not surprising that when

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[10] To insure employment opportunities for blind licensees, the Act and its regulations authorize state licensing agencies to secure space on federal property for blind vendor stands. *See, e.g.*, 34 C.F.R. §§ 395.30, 395.31. The Act and regulations authorize state licensing agencies to set aside funds from vending facility proceeds for "[t]he establishment . . . of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time . . . ." 34 C.F.R. § 395.9(5). State licensing agencies must provide vocational and other training services to

Congress decided in 1974 that the Act required new tools of enforcement, it turned to the arbitration mechanism that had proved so successful in resolving disputes in conventional labor-management relationships.

Space does not permit a lengthy discussion of federal labor arbitration law, nor is it necessary. This Court knows well that in any form of "arbitration" known to Congress in 1974, arbitration panels had authority to order remedies for violations of the governing standard (for example, collective bargaining agreements). The Court below, however, assumes implicitly that the Act uses the word "arbitrate" to mean something different from what it ever has meant before. Ample case law demonstrates that a court should not indulge in such an assumption unless compelled to do so. *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. at 73 ("we presume Congress enacted this statute with the prevailing traditional rule in mind"). According to *Delaware Dept. of Health and Social Services v. United States Department of Education*, 772 F.2d at 1130: "Except for the unique judicial review provision, there is no indication . . . that Congress used the term arbitration in any manner different from its conventional usage in other contexts. . . . [N]o member of Congress ever suggested that the scope of relief which could be awarded . . . was in any degree different from that available in other arbitration proceedings."

The prevailing understanding of arbitration (at least in the labor context) in 1974 was largely defined by the U.S. Supreme Court's "Steelworkers trilogy" cases. Among other things, those cases view arbitration as a "means of solving the unforeseeable by molding a system of private law." *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). It emphasized that

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blind vendors, including on-the-job training in all aspects of vending facility operation. 34 C.F.R. § 395.11. In effect, a blind vendor operates a small business in partnership with a state licensing agency. *See generally*, 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7.

courts should refuse "to review the merits of an arbitration award," because "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 (1960). *See also Devine v. White*, 697 F.2d 421, 453-36 (D.C. Cir. 1983) ("the arbitration result must be final and binding. Disputes should be conclusively resolved privately. Protracted litigation acts as an irritant in the industrial relationship").

Federal courts may not *review* labor arbitrators' findings or legal conclusions, but they have an important role in the *enforcement* of arbitration awards. *See, e.g., Armco Employees Independent Federation v. Armco Steel Co.*, 65 F.3d 492, 495-96 (6th Cir. 1995).

The common law in 1974 was in agreement. *La Vale Plaza v. Noonan*, 378 F.2d 569, 572 (3rd Cir. 1967).

CONCLUSION

The practical result of the decision of the Court of Appeals below, and that of the *Nash* Court, is that the civil rights of the blind citizens residing in Maryland, West Virginia, Virginia, North Carolina, South Carolina, Alabama, Georgia, and Florida are qualitatively and substantively different from and less than those of their fellow blind citizens throughout the rest of the United States. This is not right in any sense of the word, and this Court should issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the case at bar to address this most serious Constitutional Law and Federal Law split among the Federal Circuits.

This is not a class action. However, the NFB stands before this Court on behalf of the blind citizens of this Nation as surely as if it were. As Chief Justice Vinson said nearly fifty years ago: "Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions, that you represent not only your clients,

but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country." [11] Nothing less than the plans, hopes and aspirations of the blind citizens of this Nation are now before this Court.

Respectfully submitted on behalf of the National Federation of the Blind and Donald J. Morris this 28th day of March, 1997.

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[11] Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, as quoted in Stern, Gressman, *et al.*, at 163-64.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION,
DIVISION OF REHABILITATION SERVICES,
Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERAN AFFAIRS, et al.,
Respondents.

THE NATIONAL FEDERATION OF THE BLIND
and DONALD J. MORRIS,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERAN AFFAIRS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF NEVADA, ALABAMA, ALASKA, ARIZONA, HAWAII, KANSAS, MASSACHUSETTS, MICHIGAN, MONTANA, VERMONT, VIRGINIA, WASHINGTON, AND WEST VIRGINIA SUPPORTING PETITIONERS

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18 pp

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS 3

II. WHETHER AN ARBITRATION PANEL MAY ORDER A REMEDY IS AN IMPORTANT MATTER UNDER SUPREME COURT RULE 10 4

III. THE SECRETARY HAS INTERPRETED THE ACT TO SAY THAT A FINAL AND BINDING DECISION INCLUDES A REMEDY. THE COURT SHOULD DEFER TO THAT DECISION 6

IV. THE WORDS OF THE ACT REQUIRE A DECISION OF AN ARBITRATION PANEL TO INCLUDE A REMEDY 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES:

Atchison, Topeka, and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987) 9

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845, 104 S.Ct. 2778, 2781-2783, 81 L.Ed. 2d 694 (1984) 7

Delaware Dept. of Health and Social Services, Div. for Visually Impaired v. U.S. Dept. of Educ., 772 F.2d 1123 (3d Cir. 1985) 4

Gardebring v. Jenkins, 485 U.S. 415, 430 (1988) 8

Georgia Dept. of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990) 3, 5

Helms v. McDaniel, 657 F.2d 800 (5th Cir., 1981) *cert. denied*, 455 U.S. 946 4

Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs, 98 F.3d 165 (4th Cir. 1996) 3, 5

McNabb v. U.S. Dep't. of Educ., 862 F.2d 681 (8th Cir. 1988) (per curiam), *cert. denied, sub nom* 4

McNabb v. Cavazos, 493 U.S. 811 (1989) 4

TABLE OF AUTHORITIES - Continued

Minnesota Dept. of Economic Security v. Riley, 18 F.3d 606 (8th Cir. 1994) 3

Philbrook v. Glodgett, 421 U.S. 707, 713-714, 95 S.Ct. 1893, 1898-99 44 L.Ed.2d 525 (1975) 9

Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986) 3

Slack v. State of Del. Dept. of Public Instruction, 826 F. Supp. 115 (D.Del. 1993) 10

Smiley v. Citibank, _____ U.S. _____, 116 S.Ct. 1730 (1996) 7

Tennessee Dept. of Human Services v. U.S. Department of Educ., 979 F.2d 1162 (6th Cir. 1992) 4

Thomas Jefferson University v. Shalala, 512 U.S. 504, 114 S.Ct. 2381 (1994) 8

U. S. v. Mississippi Vocational Rehabilitation for the Blind, 794 F. Supp. 1344, *amended*, 812 F. Supp. 85 (S.D. Ms. 1992) 3

OTHER CASES

20 U.S.C. § 107(a) 4

20 U.S.C. § 107(b) 6

20 U.S.C. §§ 107-107f 1

20 U.S.C. § 107d-1(a) 3, 4, 5

OTHER CASES - Continued

20 U.S.C. § 107d-1(b) 3, 4, 5, 6, 8, 10

20 U.S.C. § 107d-2 3

20 U.S.C. § 107d-2(a) 5, 6, 9, 10

20 U.S.C. § 107d-2(b) 2, 5

20 U.S.C. § 107d-2(b)(1) 5

20 U.S.C. § 107d-2(b)(2) 5, 7, 9, 10

20 U.S.C. §§ 1400-1484 10

20 U.S.C. § 1415(e)(1) 4, 10

34 C.F.R. § 395 5

34 C.F.R. § 395.16 5

34 C.F.R. §§ 395.34, .35, & .7 5

34 C.F.R. § 395.37(b) 7

INTEREST OF THE AMICI CURIAE

States are deprived of an effective dispute resolution procedure in disagreements with federal agencies arising under the Randolph-Sheppard Act (20 U.S.C. §§ 107-107f and hereafter referred to as "the Act") by the decision below. The Act gives blind persons licensed by a State licensing agency priority to operate vending facilities on federal property. Disagreements between the States on behalf of blind vendors and the federal property managers are decided under an arbitration procedure. The court of appeals's decision holds that an arbitration panel can not order a remedy if it finds the federal government violated the Act.

The Amici States have instituted or may institute the arbitration procedures in response to a federal agency's refusal to provide the required facilities for blind vendors or other violation of the Act. For example, Nevada is currently in an arbitration proceeding on behalf of thirty eight per cent of the blind vendors placed on federal property within its State. The decision of the court of appeals undercuts the value of the arbitration panels and delays the proceedings because a federal agency is not compelled to comply with the Act regardless of the number of times a State proves its case. This harms blind vendors and encourages federal agencies to ignore the Act. The issue is not unique to Maryland. It is of nationwide concern.

SUMMARY OF ARGUMENT

The holding of the court of appeals for the fourth circuit conflicts with the opinions of the courts of appeals for the eighth circuit and the District of Columbia circuit on whether an arbitration panel under the Act may include a remedy in its decision. This is an important issue as Congress created and expanded employment opportunities for blind persons by giving them priority to operate businesses on federal property. The Act's arbitration procedure resolves disputes between State agencies licensing the blind individuals and the federal property manager. The fourth circuit opinion that the arbitration panel's decision cannot include a remedy destroys the effectiveness of that procedure. This is because a federal agency found to violate the Act may simply continue violating the Act without having to change any acts or practices.

In addition, courts defer to agency interpretation of a statute. The Secretary of Education resolved any ambiguity in the Act by regulation and by the decision of an arbitration panel which is a final agency action. Further, the Secretary's arbitration panel included a remedy in its decision. The court below did not defer to the Secretary's interpretation of the Act in regulation and in the arbitration panel's decision.

Finally, the court below incorrectly interpreted the plain language of 20 U.S.C. § 107d-2(b). The one sentence relied upon by the court of appeals instructs a federal agency found violating the law to stop all acts or practices in violation of the law and to implement the arbitration panel's decision including the remedy. That sentence does not take away the arbitration panel's authority to include a remedy in its decision.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In *Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996) the court of appeals for the fourth circuit held that an arbitration panel deciding a dispute between a State and the federal government under the Act has no authority to decide a remedy if it finds the federal government violated the Act. This is consistent with the eleventh circuit court of appeals in *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990) and a district court in *U. S. v. Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344, *amended*, 812 F. Supp. 85 (S.D. Ms. 1992).

In contrast, the eighth Circuit and the District of Columbia Circuit ruled that an arbitration panel may order a remedy when it concludes a federal agency violated the law. In *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986) the court of appeals dismissed an action brought under the Act for failure to exhaust an administrative remedy. It held that an arbitration panel had "broad remedial powers under the Act." 795 F.2d at 109. The possible remedies included invalidating contracts issued by federal agencies to businesses, prospective relief as to future contracts, and placing blind vendors at selected federal properties. Similarly, the eighth circuit court of appeals affirmed an order requiring the U.S. Department of Veterans Affairs to follow the permit procedure established by the Act. *Minnesota Dept. of Economic Security v. Riley*, 18 F.3d 606 (8th Cir. 1994).

The same or similar sections of law (20 U.S.C. §§ 107d-2 and 107d-1(a) and (b)) define the authority of an

arbitration panel in disputes between a blind vendor and a State as in disputes between a State and the federal government. The courts of appeals of three circuits have ruled that an arbitration panel may include a remedy when deciding disputes between a State and a blind vendor. *Delaware Dept. of Health and Social Services, Div. for Visually Impaired v. U.S. Dept. of Educ.*, 772 F.2d 1123 (3d Cir. 1985) (arbitration panel may award compensatory damages and attorney's fees in a decision under 20 U.S.C. § 107d-1(a) which has same words as 20 U.S.C. § 107d-1(b)); *McNabb v. U.S. Dep't. of Educ.*, 862 F.2d 681 (8th Cir. 1988) (per curiam), *cert. denied, sub nom. McNabb v. Cavazos*, 493 U.S. 811 (1989) (arbitration panel may award prospective damages); *Tennessee Dept. of Human Services v. U.S. Department of Educ.*, 979 F.2d 1162 (6th Cir. 1992) (arbitration panel may award accrued vending machine income). See also *Helms v. McDaniel*, 657 F.2d 800 (5th Cir., 1981) *cert. denied*, 455 U.S. 946 for consideration of the meaning of the term final decision under the Individuals with Disabilities Education Act in 20 U.S.C. § 1415(e)(1).

In summary, the decision of the fourth circuit court of appeals conflicts with the decisions of the court of appeals of the eighth and District of Columbia circuits. The Court should grant a petition for certiorari.

II. WHETHER AN ARBITRATION PANEL MAY ORDER A REMEDY IS AN IMPORTANT MATTER UNDER SUPREME COURT RULE 10.

A writ of certiorari should be granted because this is an important matter not yet decided by this court. The purpose of the Act is to provide employment opportunities to blind people. Title 20 U.S.C. § 107(a) states:

> For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in

> striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

The United States Secretary of Education (hereafter, "Secretary") promulgated regulations implementing the Act. 34 C.F.R. pt. 395. Under the regulations, a State submits a permit including the terms and conditions of operating the facility to the federal property manager. 34 C.F.R. § 395.16. If the federal department approves the permit, it is issued to the State agency. The State agency places a blind vendor at the federal property to operate a vending stand. 34 C.F.R. §§ 395.34, 395.35, and 395.7.

In 1974, the Congress amended the Act to include arbitration procedures to resolve disputes between States and the federal government. Section 206, Pub.L. 93-516, codified at 20 U.S.C. §§ 107d-1(b), 107d-2(a), and 107d-2(b)(2). Disputes between the blind vendor and a State agency are governed by 20 U.S.C. §§ 107d-1(a), 107d-2(a), and 107d-2(b)(1). A blind vendor may not file an arbitration complaint directly against the federal government. *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990).

The decision in *Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs,* 98 F.3d 165 (4th Cir. 1996) weakens the enforcement mechanism available to blind vendors and the State licensing agencies which protect them. Essentially, the fourth circuit court of appeals held that an arbitration panel may only find if a federal agency violated the Act. Any specific steps or remedies to comply with the Act must be determined by the federal agency which violated the law already. If a State licensing agency believes the remedy proposed by the federal property manager also violates the law, the State agency must file another complaint convening another arbitration panel. 98 F.3d at 171.

Presumably, a second arbitration panel could agree with the State agency determining the federal agency violated the law. Once again, the second panel could not order any specific remedy. Rather, the federal property manager would propose another action which could violate the law forcing the State to file a third arbitration complaint. There could be no end to the procedure while a blind person licensed by a State agency remains unemployed.

Blind vendors are already limited by statute in the procedures they may use to obtain compliance with the "priority" established by 20 U.S.C. § 107(b). They cannot file arbitration complaints directly against the federal property manager where their business is located. The Act is weakened if a federal agency may simply not comply with the law.

In summary, the Congress has established a priority for blind people to operate vending stands on federal property. The law currently provides no direct dispute resolution procedure for disputes between the blind vendor and the federal government. The decision below weakens the ability of State agencies to advocate on behalf of the blind population who are to benefit from this law.

III. THE SECRETARY HAS INTERPRETED THE ACT TO SAY THAT A FINAL AND BINDING DECISION INCLUDES A REMEDY. THE COURT SHOULD DEFER TO THAT DECISION.

Three sections of the Act describe the arbitration panel's decision in disputes between State licensing agencies and federal property managers. First, 20 U.S.C. § 107d-1(b) states, "...the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

Next, 20 U.S.C. § 107d-2(a) says, "Such panel shall, in accordance with the provisions of subchapter II of chapter

5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5." Finally, 20 U.S.C. § 107d-2(b)(2) says,

> "If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel."

The fourth circuit court of appeals relied upon this last section in making its decision.

Courts defer to agency interpretation of statutes. *Smiley v. Citibank*, _____ U.S. _____, 116 S.Ct. 1730 (1996). *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 104 S.Ct. 2778, 2781-2783, 81 L.Ed. 2d 694 (1984). Here, the Secretary's regulation stated the decision was final subject only to review Administrative Procedures Act ("APA"). Title 34 C.F.R. § 395.37(b) states:

> "... (the panel's) decision which shall be final and binding on the parties except that such decision shall be subject to appeal and review as a final agency action for purposes of the provisions of 5 U.S.C. ch. 7."

In this case, the Secretary analyzed all three sections of the Act passed by Congress. He decided that the decision of the arbitration panel was to be final subject only to review under the APA. The Secretary had the opportunity to review the ambiguity, if any, created by the Act and decided to

interpret these three sections of the statute as creating a final decision including a remedy.

This is further shown by the Secretary's decision in this case. On behalf of the Secretary, the arbitration panel ordered the Department of Veterans Affairs to provide a specific remedy, that is, a permit to the Maryland State licensing agency to operate a vending facility. Agency decisions in interpreting agency regulation are entitled to deference. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 114 S.Ct. 2381 (1994). As Justice Stevens wrote in the majority opinion in *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

> (W)hen it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.

In this case, the Secretary has interpreted the Act to provide for a final decision which includes a remedy. The arbitration panel on behalf of the Secretary issued a decision including a remedy. The Court should defer to the Secretary's interpretation that a final and binding decision includes a remedy.

IV. THE WORDS OF THE ACT REQUIRE A DECISION OF AN ARBITRATION PANEL TO INCLUDE A REMEDY.

In this case, three different sections of law must be considered to decide if a remedy is to be included in a final decision of an arbitration panel. Title 20 U.S.C. § 107d-1(b)

describes the decision as final and binding. Title 20 U.S.C. § 107d-2(a) says the decision is a final agency action subject to judicial review under the Administrative Procedures Act.

The court below relied exclusively upon 20 U.S.C. § 107d-2(b)(2) which says,

> If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

The plain language of this statute supports the States. This sentence instructs federal property managers to: (1) stop any violations of the Act found by a panel; and (2) take any other action needed to carry out the decision of the panel. It does not prohibit an arbitration panel from including a remedy in its decision. An arbitration panel appointed under the Act may include a specific remedy in its decision.

Rules of statutory construction support this plain reading of 20 U.S.C. § 107d-2(b)(2). Remedial statutes should be interpreted liberally. *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). Further, as the Court stated in *Philbrook v. Glodgett*, 421 U.S. 707, 713-714, 95 S.Ct. 1893, 1898-99 44 L.Ed.2d 525 (1975) which states:

> "In expounding a statute, we must not be guided by a single sentence or member of sentence, but look to the provisions of the whole law, and to its object and policy." (cites

> omitted)...Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will...."

Construing the Act liberally and looking at all three sections governing the contents of an arbitration panel decision, a decision may include a remedy. The decision is to be final and binding. 20 U.S.C. § 107d-1(b). It is to be a final agency action. 20 U.S.C. § 107d-2(a).

Court interpretations of the final decision requirement of the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400-1484) support the principle that a final decision includes a remedy. Title 20 U.S.C. § 1415(e)(1) states:

> A *decision* made under subsection (c) of this section *shall be final*, except that any party may bring an action under paragraph (2) of this subsection. (emphasis added)

A hearing panel's decision finding a child with a disability was entitled to a private school placement but declining to decide at what school was not a final decision and violated this section. *Slack v. State of Del. Dept. of Public Instruction,* 826 F. Supp. 115 (D.Del. 1993). A decision which is final under federal statute must include a remedy.

The sentence of 20 U.S.C. § 107d-2(b)(2) relied on by the court below instructs a federal agency to stop the violations "promptly" and to carry out the decision of the panel. This instruction does not take away the authority to decide a remedy. Rather, it directs the federal agency to stop all violations and implement the remedy contained in the decision of the arbitration panel.

In conclusion, the court of appeals for the fourth circuit violated common rules of statutory construction in reaching its decision. The plain language of the statute describes the

arbitration panel's decision as final and binding. The sentence relied upon by the fourth circuit court of appeals directs the federal agency to stop violating the law and implement the decision of the panel including a remedy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 30, 1997.

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OCTOBER TERM, 1996

THE NATIONAL FEDERATION OF THE BLIND, DONALD J. MORRIS, and MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL COUNCIL OF STATE AGENCIES FOR THE BLIND AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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26pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. THE PROFOUND CONFUSION REGARDING THE ACT MAKES IT PRACTICALLY IMPOSSIBLE FOR STATE AGENCIES TO ABIDE BY, LET ALONE ENFORCE, THIS FEDERAL LAW	3
II. BECAUSE THE ACT IS A CIVIL RIGHTS STATUTE, AND BECAUSE THE RIGHTS OF THE BLIND UNDER THE ACT HAVE BEEN IMPERILED BY THE DECISION BELOW, THERE IS AN URGENT NEED TO RECEIVE CLARIFICATION FROM THIS COURT	7
A. The Randolph-Sheppard Act and the Rehabilitation Act of 1973 Are Closely Related "Sister Acts," and Ought to Be Read and Construed Together	7
B. Because Safeguards Which Exist Under Other Federal Civil Rights Statutes Are Unavailable Under the Act, the Guidance of This Court Is Urgently Needed in Order to Vouchsafe the Civil Rights of the Blind	12
III. IN ORDER TO INSURE UNIFORMITY OF ENFORCEMENT THROUGHOUT THE NATION, THERE IS A PRESSING NEED TO CLARIFY THE POWERS OF THE SECRETARY OF EDUCATION UNDER THE ACT	13

TABLE OF CONTENTS—Continued

Page

A. The Legislative History of the Act Demonstrates That the Secretary of Education Is to Both Interpret and Actively Participate in the Enforcement of the Act 13

B. The Secretary of Education Could Obviate Many of the Enforcement Problems Presented by This Act, if His Role Were Properly Defined by This Court 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases	Page
Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)	10
Boudette v. Barnette, 923 F.2d 754 (9th Cir. 1991)	17
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	18
Collier v. William Penn School District, —— F. Supp. —— (E.D. Penn. Feb. 28, 1997)	20
Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 711, 133 L.Ed.2d 666 (1996)	9
Delaware Department of Health and Social Services v. United States Department of Education, 772 F.2d 1123 (3rd Cir. 1985)	10
Franklin v. Gwinnett Public Schools, 503 U.S. 60 (1992)	20
Georgia Department of Health and Social Services v. Nash, 915 F.2d 1482 (11th Cir. 1990)	6
Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994)	20
Klopfer v. North Carolina, 386 U.S. 213 (1967)	9
Maryland State Department of Education v. United States Department of Veterans Affairs, 98 F.3d 165 (4th Cir. 1996)	6
Mayer v. University of Minnesota, 940 F. Supp. 1474 (D. Minn. 1996)	9
Minnesota Department of Economic Security v. Riley, 107 F.3d 648 (8th Cir. 1997)	6
Minnesota Department of Jobs & Training v. Riley, 18 F.3d 606 (8th Cir. 1994)	6
Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (10th Cir. 1993)	20
Texas State Commission for the Blind v. United States, 796 F.2d 400 (Fed. Cir. 1986)	10
Union Pacific Railroad Co. v. Burton, 1996 WL 733943 (D. Wy. Dec. 24, 1996)	10
Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468 (1987)	9
Zinermon v. Burch, 494 U.S. 113 (1990)	9

TABLE OF AUTHORITIES—Continued

Statutes and Rules	Page
20 U.S.C. § 107	2
20 U.S.C. § 107a(b)	4
20 U.S.C. § 107a(d)(1)	6, 15, 17, 19
20 U.S.C. § 107(b)	*passim*
20 U.S.C. § 107b	4
20 U.S.C. § 107d-1	5, 15, 16, 19
20 U.S.C. § 107d-1(a)	10
20 U.S.C. § 107d-1(b)	6, 10, 11
20 U.S.C. § 107d-2	15, 17, 19
20 U.S.C. § 107d-3(a)	4
20 U.S.C. § 3441	13
29 U.S.C. § 701	8
29 U.S.C. § 791	10
29 U.S.C. § 794a(a)(1)	10
29 U.S.C. § 794	10
34 C.F.R. § 395.4	4
34 C.F.R. § 395.5	4
34 C.F.R. § 395.5(5)	11
34 C.F.R. § 395.6	4, 5, 12
34 C.F.R. § 395.7	4
34 C.F.R. § 395.8	4, 11
34 C.F.R. § 395.9	4, 11
34 C.F.R. § 395.10	5, 12
34 C.F.R. § 395.11	4
34 C.F.R. § 395.30	11
34 C.F.R. § 395.31	11
34 C.F.R. § 395.32	5, 11
34 C.F.R. § 395.35	11
34 C.F.R. § 395.36	11
42 U.S.C. § 12101(b)(4)	9
42 U.S.C. § 2000e-16(c)	10
Wis. Stat. § 49.29	4

Other Authorities	
42 Fed. Reg. 15807	16
43 Fed. Reg. 28967	12
119 Cong. Rec. 34,082 (1973)	8
120 Cong. Rec. 20,117 (1974)	8

TABLE OF AUTHORITIES—Continued

	Page
120 Cong. Rec. 20,118 (1974)	13
120 Cong. Rec. 35,711 (1974)	13
120 Cong. Rec. 35,712 (1974)	9
Senate Report 93-937	15, 17
3 *Sutherland on Statutory Construction* § 60.01 (5th ed. 1992)	7, 16
Americans With Disabilities Act of 1990	7, 8, 9
Rehabilitation Act of 1973	*passim*
Hearings before the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2581, 93rd Cong., 1st Sess. 3 (1974)	14, 17
Lindemann & Grossman, 1 *Employment Discrimination Law* 336 (ABA 17996)	10, 12
U.S. Const. amend. XIV	9, 10
Sup. Ct. R. 37	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-1550 and 1551

THE NATIONAL FEDERATION OF THE BLIND, DONALD J. MORRIS, and MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL COUNCIL OF STATE AGENCIES FOR THE BLIND AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

This Brief *Amicus Curiae* of the National Council of State Agencies for the Blind ("NCSAB") and the National Association of Social Workers ("NASW") is submitted pursuant to Supreme Court Rule 37. The NCSAB has sought and obtained consent from Petitioners and Respondents to file this Brief and, thus, this Brief is submitted without a motion pursuant to Supreme Court Rule 37.*

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* Pursuant to Supreme Court Rule 37.6, counsel of record for the NCSAB, Attorney Jack Duncan, did in part author this Brief *Amici Curiae*. Attorney Craig Galle of the St. Louis, Missouri law firm of Greensfelder, Hemker & Gale substantially contributed to the authorship of this Brief. Mr. Galle was retained by and was paid

STATEMENT OF INTEREST

The Maryland State Department of Education, Division of Rehabilitation Services ("MSDE"), one of the Petitioners for a Writ of Certiorari in the case at bar, is a State Licensing Agency ("SLA") within the meaning of the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.* The NCSAB is an organization consisting of SLAs from each of the fifty States in the United States. The MSDE is one of the members of the NCSAB, and it is for this reason that the NCSAB submits this Brief *Amicus Curiae* in support of the Petitions filed in this case by the MSDE and the National Federation of the Blind and Donald J. Morris ("NFB").

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world with over 155,000 members and 55 chapters nationally and internationally. The Maryland Chapter of NASW represents social workers in Maryland with over 4,200 members. Founded in 1955 from the merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work practice and to the development and application of NASW's policy statement on "People with Disabilities."

As stated in this policy statement, NASW supports the rights of people with disabilities to participate fully and equitably in society. These rights include the freedom, to the fullest extent possible, of all people with disabilities to live independently, to enjoy the rights of full societal membership, to exercise self-determination, and to have full participation in issues related to education, housing, transportation, work, healthcare, social services, and other public accommodations."

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by the NCSAB, and is thus also counsel for the NCSAB. The NCSAB is solely responsible for all costs incurred for the preparation, filing and service of this Brief, and no monetary contribution to the preparation or submission of this Brief has been made by any other party.

STATEMENT OF THE CASE

The NCSAB and NASW adopt the Statement contained in the MSDE's Petition as supplemented by the Statement contained in the NFB's Petition.

SUMMARY OF ARGUMENT

Because the civil rights of the blind have been placed in jeopardy by the decision of the Court below, and because of the confusion which exists concerning the Act in general, the NCSAB respectfuly but strenuously urges this Court to exercise its Certiorari Jurisdiction in order to clarify the responsibilities of the States under the Act. The NCSAB and NASW further urge this Court to take Certiorari Jurisdiction of this case in order to determine exactly how and to what degree the Randolph-Sheppard Act ought to be construed with and applied like the Rehabilitation Act of 1973, and other similar civil rights statutes.

In order to insure uniformity of enforcement throughout the Nation, the NCSAB and NASW also urge that this Court clarify the powers of the Secretary of Education under the Act.

ARGUMENT

I. THE PROFOUND CONFUSION REGARDING THE ACT MAKES IT PRACTICALLY IMPOSSIBLE FOR STATE AGENCIES TO ABIDE BY, LET ALONE ENFORCE, THIS FEDERAL LAW.

The Petitions of the MSDE and the NFB amply chronicle the split in the Circuits concerning the meaning and scope of the Act, and the NCSAB and NASW concur that such a split in and of itself is a sound reason for this Court to issue a Writ of Certiorari in the case at bar. However, from the perspective of the State agencies that must enforce this Act, a far more cogent basis for requesting this Court to exercise Certiorari Jurisdiction over the case at bar is the profound confusion and uncertainty which exists concerning the meaning of the Act, and the

resulting doubt as to just how the States are to insure compliance with the Act.

The confusion which manifestly exists among the Circuits concerning the Act has, as a pratical matter, made it virtually impossible for the States to protect blind vendors who must make their living on federal property, which clearly is a central responsibility of the States under the Act. Because this confusion involves the most fundamental civil rights of a large number of blind citizens in this Country, it is particularly appropriate for this Court to exercise its Certiorari Jurisdiction to resolve that confusion.

The States in this Nation, through and by their SLAs, have been given the responsibility of finding and securing employment opportunities for blind citizens on federal property. 20 U.S.C. § 107a(b). The Act by its terms is not an affirmative action statute, but is rather more in the nature of a precursor to the "welfare to work" statutes which are now popular in a number of States, such as Wisconsin. *Cf.* Wis. Stat. § 49.29.[1]

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[1] The Act essentially is an employment law providing for the employment opportunities and working conditions of blind vendors. In effect, a blind vendor under the Act operates a small business enterprise in partnership with a state licensing agency under the authority of 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7. Apparently, Congress intended state licensing agencies to be senior partners in that partnership. *See, e.g.*, 20 U.S.C. § 107d-3(a), which authorizes the state licensing agency to place a ceiling on the amount of income that a blind licensee can receive from vending machines on federal property. *Cf.* 34 C.F.R. § 395.5 and § 395.8. Consistent with the interpretation that the act is an employment law, 34 C.F.R. § 395.11 mandates that state licensing agencies provide vocational and other training services to blind vendors, including on-the-job training in all aspects of vending facility operation. Moreover, each state licensing agency must, in issuing licenses for the operation of blind vending facilities on federal property, give preference to blind persons in need of employment. 20 U.S.C. § 107a(b).

Because blind vendors earn money which is subject to control by state licensing agencies (34 C.F.R. § 395.8 and § 395.9) and federal

Congress, in its wisdom, has mandated that the States, again through and by their SLAs, must insure that the several federal agencies provide appropriate space for blind vending stands on federal property administered by the federal agencies.[2] Congress has further mandated that the States, again through and by their SLAs, are responsible for enforcing the provisions of the Act against federal agencies, and for safeguarding the working conditions, and by implication the civil rights, of blind citizens on federal property.

The sole and exclusive method by which the SLAs are to accomplish this task is by means of an arbitration panel convened pursuant to the very provision of the

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property managers (34 C.F.R. § 395.32), and because the working conditions and other conditions of employment of the blind vendor are regulated in detail by state licensing agencies (34 C.F.R. § 395.6 and § 395.10), it is not at all surprising to find Congress speaking in terms of the "final and binding arbitration of disputes" arising between the parties subject to the Act.

[2] 20 U.S.C. § 107a(d)(1), which provides:

> After January 1, 1975, no department, agency, or instrumentality of the United States shall undertake to acquire by ownership, rent, lease, or to otherwise occupy, in whole or in part, any building unless, after consultation with the head of such department, agency, or instrumentality and the State licensing agency, it is determied by the Secretary that (A) such building includes a satisfactory site or sites for the location and operation of a vending facility by a blind person, or (B) if a building is to be constructed, substantially altered, or renovated, or in the case of a building that is already occupied on such date by such department, agency, or instrumentality, is to be substantially altered or renovated for use by such department, agency, or instrumentality, the design for such construction, substantial alteration, or renovation includes a satisfactory site or sites for the location and operation of a vending facility by a blind person. Each such department, agency, or instrumentality shall provide notice to the appropriate State licensing agency of its plans for occupation, acquisition, renovation, or relocation of a building adequate to permit such State agency to determine whether such building includes a satisfactory site or sites for a vending facility.

Act which is at issue in the case at bar, *i.e.*, 20 U.S.C. § 107d-1(b).

The SLAs are completely at a loss as to how they can comply with the requirements of the Act when they are faced with decisions, such as the one below, which hold that panels convened pursuant to § 107d-1 have no remedial powers whatsoever. *Maryland State Department of Education v. United States Department of Veterans Affairs*, 98 F.3d 165, 168 (4th Cir. 1996); *Georgia Department of Health and Social Services v. Nash*, 915 F.2d 1482, 1492 (11th Cir. 1990). The SLAs' consternation is exacerbated by the fact the SLAs are faced with obstinate federal agencies which force the SLAs into long and protracted litigation attempting to obtain compliance with panel decisions in Circuits where the decisions of the panels are deemed to have remedial powers. *See, e.g., Minnesota Department of Jobs & Training v. Riley*, 18 F.3d 606 (8th Cir. 1994) and *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997).

Candidly, the SLAs are confused and frustrated. Tragically, their confusion and frustration implicates and affects not just the interests of the States, but also the rights of blind vendors. In point of fact, the uncertainty and inability of the SLAs to fulfill their mandate under the Act effects adversely the most fundamental civil rights of the blind citizens who have acquired substantial property interests, and must make their living under the Act in the States of the Nation.

The Secretary of Education, who should assist the States in resolving this uncertainty, has been inexplicably silent throughout much of the litigation concerning the Act, adding to the confusion about how the SLAs are to comply with the requirements of the Act.

The fact that the DVA did not seek appropriate approval from the Secretary of Education for the DVA's attempted limitation in the case at bar on the placement

of a blind vending stand at the VAMC under 20 U.S.C. § 107(b) was placed in issue by the NFB in its Brief *Amicus Curiae*, filed with the Court of Appeals on November 21, 1995. Nevertheless, the Court below did not address this fact, nor did it address the absence of the Secretary of Education as a party to the proceedings below.

The NCSAB and NASW earnestly request that this Court exercise its Certiorari Jurisdiction in order to clarify the responsibilities of the States under the Act.

II. BECAUSE THE ACT IS A CIVIL RIGHTS STATUTE, AND BECAUSE THE RIGHTS OF THE BLIND UNDER THE ACT HAVE BEEN IMPERILED BY THE DECISION BELOW, THERE IS AN URGENT NEED TO RECEIVE CLARIFICATION FROM THIS COURT.

While not styled as such, the Randolph-Sheppard Act is a civil rights statute and ought to be construed accordingly. Moreover, according to *3 Sutherland on Statutory Construction* § 60.01, at p. 147 (5th ed. 1992):

> Remedial statutes are liberally construed to suppress the evil and advance the remedy. The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established.

A. The Randolph-Sheppard Act and the Rehabilitation Act of 1973 Are Closely Related "Sister Acts," and Ought to Be Read and Construed Together.

The legislative history underlying the Randolph-Sheppard Act demonstrates that the 1974 Amendments to the Randolph-Sheppard Act, the Rehabilitation Act of 1973, and the Americans With Disabilities Act of 1990 ("ADA") are very closely related civil rights laws, and thus ought to be read and construed as though part of the same Act.

In fact, Congress originally intended that the 1974 Amendments to the Randolph-Sheppard Act and the Re-

habilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, were to be combined in the same legislation. Indeed, the 1974 Amendments to the Randolph-Sheppard Act were originally included as a separate title to the Rehabilitation Act but were segregated from the Rehabilitation Act at the last moment because of a "point of order" in the House under its germaneness rule.

> On September 14, 1971, I [Sen. Randolph] introduced S.2506, the 'Randolph-Sheppard Act for the Blind Amendments of 1971.' Hearings were held on that measure in September, October, and December of 1971. The provisions, again very similar to those in the bill I am introducing, were included as a title in the Senate's Rehabilitation Act of 1972. Unfortunately, when that measure was brought to conference, the House conferees indicated that the Randolph-Sheppard provisions would be subject to a point of order in the House because of its germaneness rule. The provisions were dropped from the conference report, with the explicit understanding of the need for action.

119 Cong. Rec. 34,082 (1973).

Rather than delay the enactment of the Rehabilitation Act pending a resolution of the point of order issue, Congress merely segregated out the Randolph-Sheppard Act 1974 Amendments and passed the Rehabilitation Act of 1973 forthwith with the stated intention of addressing and enacting the Randolph-Sheppard Amendments in its next term. *Id.*

The legislative history of the Rehabilitation Act of 1973 reinforces the foregoing affinity betwen that Act and the Randolph-Sheppard Act. The Rehabilitation Act "in effect strengthens the Randolph-Sheppard Act and gives added protection to the blind." 120 Cong. Rec. 35,712 (1974). Moreover, that same legislative history clearly demonstrates that the Randolph-Sheppard Act was "the third in a series of bills" on the subject of protecting and affording rights to the disabled. 120 Cong. Rec.

20,117 (1974) (statements of Sen. Randolph). Because the 1974 Amendments to the Randolph-Sheppard Act and the Rehabilitation Act of 1973 were a part of the same legislation, it leads to the inescapable conclusion that they are to be interpreted in the same manner. *Cf.* 120 Cong. Rec. 35,712 (1974).

Similarly, the ADA is to be judicially interpreted in the same manner as the Rehabilitation Act of 1973. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832, n.3 (9th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 711, 133 L.Ed.2d 666 (1996). This determination is based on the substantially identical language in the two Acts and the legislative history of the ADA which indicates that Congress intended judicial interpretation of the Rehabilitation Act to be incorporated by reference into the interpretation of the ADA. *Id.*

It is well recognized that both the ADA and the Rehabilitation Act of 1973 were enacted by Congress pursuant to its authority under the Fourteenth Amendment to the United States Constitution. In turn, as this Court has often held, the Fourteenth Amendment incorporates by reference the Bill of Rights to the United States Constitution. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967).

The ADA specifically states that its purpose is "to invoke the sweep of Congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities." 42 U.S.C. § 12101(b)(4); *see also Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1480 (D. Minn. 1996) (ADA was enacted pursuant to the Fourteenth Amendment). Similarly, courts have repeatedly held that the Rehabilitation Act of 1973 was enacted by the Congress pursuant to the Fourteenth Amendment to the United States Constitution. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 472, n.2

(1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243-244 (1985); *Union Pacific Railroad Co. v. Burton*, 1996 WL 733943, *9 (D. Wy. Dec. 24, 1996).

Because the 1974 Amendments to the Randolph-Sheppard Act and the Rehabilitation Act of 1973 were originally intended to be a part of the same legislation, and since the Randolph-Sheppard Act Amendments were in their pre-inception a sub-title to what became the Rehabilitation Act of 1973, it follows that, like the Rehabilitation Act and the ADA, the Randolph-Sheppard Act Amendments were also enacted pursuant to the Fourteenth Amendment. Thus, a Randolph-Sheppard Act arbitration panel convened pursuant to 20 U.S.C. § 107d-1(a) may properly award damages against a State, despite the Eleventh Amendment. *Delaware Department of Health and Social Services v. United States Department of Education*, 772 F.2d 1123 (3rd Cir. 1985). Similarly, an arbitration panel convened pursuant to 20 U.S.C. § 107d-1(b) is also authorized to award damages or provide for other relief against federal agencies. *Cf. Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986).

While federal executive agencies are exempt from the ADA, they are covered by §§ 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794, which incorporate the remedies, procedures and rights set forth in Title VII (42 U.S.C. § 2000e-16(c)) for federal employees. 29 U.S.C. § 794a(a)(1). According to Lindemann & Grossman, 1 *Employment Discrimination Law* 336 (ABA 1996):

> The 1978 amendments to the Rehabilitation Act provide that the remedies and procedures for implementing and enforcing § 717 of Title VII also apply to § 501 [of the Rehabilitation Act]. The charge-filing, investigation, and hearing procedures, including awards of attorney's fees, are the same for federal employees under § 501 as they are under Title VII and the Age Discrimination in Employment Act.

Admittedly, the Randolph-Sheppard Act takes a circuitous route to establish employment opportunities for blind vendors, but those vendors are nevertheless self-employed licensees of the SLAs (in effect business partners with the several SLAs) who must make their living on federal property.[3] Like federal employees under the Rehabilitation Act of 1973, the blind vendors, or more properly SLAs on their behalf, should have the ability to pursue remedies against federal agencies when those agencies create unacceptable working conditions for blind vendors or otherwise limit their employment opportunities through and by SLA arbitrations pursuant to 20 U.S.C. § 107d-1(b). It is not at all surprising to find Congress speaking in terms of the "final and binding arbitration of disputes" arising between the parties subject to the Act given the Act's similarity to other employment discrimination laws and the following considerations: a) blind vendors earn money which is subject to control by state licensing agencies (34 C.F.R. § 395.8 and § 395.9) and federal property managers (34 C.F.R. § 395.32); and b) the working conditions and other conditions of em-

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[3] In order to insure that blind licencees have employment opportunities, the Act authorizes state licensing agencies to secure space on property owned by federal agencies sufficient to accommodate blind vendor stands. *See, e.g.*, 34 C.F.R. § 395.30 and § 395.31. At least in part, federal property managers have the right to exercise control over income belonging to blind vendors (34 C.F.R. § 395.32), which right carries with it, in the view of the NCSAB and NASW, fiduciary responsibilities by clear implication.

Congress mandated that state licensing agencies and federal property managers must cooperate to insure compliance with civil rights and other laws by blind vendors on federal property. 34 C.F.R. § 395.35 and § 395.36.

A state licensing agency is, in fact, authorized to assume some of the responsibilities customarily performed by an employer *vis-à-vis* a blind vendor. For example, a state licensing agency is authorized to set aside funds from the net proceeds of the operation of vending facilities for the purposes of "the establishment . . . of retirement and pension funds, health insurance contributions, and provision for paid sick leave and vacation time . . . ." 34 C.F.R. § 395.5(5).

ployment of the blind vendor are regulated in detail by the SLAs (34 C.F.R. § 395.6 and § 395.10).

The NCSAB and NASW respectfully submit that this Court ought to take Certiorari Jurisdiction of this case in order to determine exactly how and to what degree the Randolph-Sheppard Act is to be construed with and applied like the Rehabilitation Act of 1973.

B. Because Safeguards Which Exist Under Other Federal Civil Rights Statutes Are Unavailable Under the Act, the Guidance of This Court Is Urgently Needed in Order to Vouchsafe the Civil Rights of the Blind.

Under Executive Order 12,067,[4] the EEOC is responsible for coordinating the federal effort to enforce federal equal employment opportunity laws. According to Lindemann & Grossman, *supra*, Volume II, at pp. 1245-46:

> The EEOC coordinates with other [federal] agencies in carrying out overlapping mandates. . . . The EEOC . . . has responsibility for investigating employment discrimination complaints against recipients of federal financial assistance subject to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments Act of 1972, and other similar statutes, where the complaints also allege Title VII, ADA, or Equal Pay Act violations.

Notably missing from the EEOC's jurisdictional responsibilities are the blind under the Act. Instead, the States have been thrust into the role of the EEOC *vis-à-vis* the rights of the blind, and the States are hard-pressed to fulfill this serious duty given the holding of the Court below and the confusion which presently exists concerning the scope and meaning of the Act throughout the Circuit Court of Appeal.

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[4] 43 Fed. Reg. 28,967 (1978).

III. IN ORDER TO INSURE UNIFORMITY OF ENFORCEMENT THROUGHOUT THE NATION, THERE IS A PRESSING NEED TO CLARIFY THE POWERS OF THE SECRETARY OF EDUCATION UNDER THE ACT.

While in practice it has fallen primarily to the States to vouchsafe the rights of the blind under the Act, the NCSAB and NASW respectfully submit that it was the intent of Congress that this responsibility would be shared with the Secretary of Education. Unfortunately, the Secretary has not, or perhaps cannot, fulfill this role. The NCSAB and NASW respectfully submit that this Court should exercise its Certiorari Jurisdiction in order to clarify the role that the Secretary of Education ought to play in enforcing the Act.

A. The Legislative History of the Act Demonstrates That the Secretary of Education Is to Both Interpret and Actively Participate in the Enforcement of the Act.

The predecessor to the Secretary of Education under the Act was the Secretary of Health, Education, and Welfare, and thus references in the Legislative History of the Act to the latter should be understood as applying to the former. 20 U.S.C. § 3441. Congress made it very clear that the Secretary of Education is to occupy a pivotal role in enforcing the Act.

> [W]ith respect to the vending stand program, the conference report requires a priority for blind vendors on Federal property. Overall regulatory authority over the program is vested in the Secretary of Health, Education and Welfare.

120 Cong. Rec. 35,711 (1974).

Elsewhere it is noted that there is under the Act "a requirement that overall authority over, evaluation of, and standards for, the program be placed in the Secretary of HEW. . . ." 120 Cong. Rec. 20,118 (1974). Senator Randolph, the principal author of the Randolph-Sheppard Act, stated in the Randolph-Sheppard hearings that ". . .

the Department of Health, Education and Welfare—HEW —is the principal agency for carrying out the Randolph-Sheppard Act." *Hearings before the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2581*, 93rd Cong., 1st Sess. 3 (1974) [in the record below as an appendix to the Brief *Amicus Curiae* of the NFB, filed with the Court of Appeals below on October 21, 1995].

Congress recognized the need for the Secretary of Education to act in an oversight capacity for the Randolph-Sheppard Act program to ensure that federal agencies would comport themselves with the mandates and requirements of the Act.

> A number of witnesses, numerous letters to the committee, and newspaper articles clearly suggested that Federal agencies had not done all that they could to insure the establishment and the maintenance of blind vendors on property under their control. In addition, certain Federal agencies were charged with imposing arbitrary and harmful limitations on blind vendor operations with respect to the kinds of merchandise a blind vendor was permitted to sell, with respect to the location of [a] blind stand, or with respect to the amount permitted to accrue to a vendor.
>
> * * * *
>
> The Committee finds that there is a record of abuses and neglect of the Randolph-Sheppard program by officials of various Federal agencies that is adequate to justify the placement of increased overall authority for its operation with the Secretary of Health, Education, and Welfare.
>
> * * * *
>
> The Committee believes that the Department of Health, Education, and Welfare should be the overseer of the Randolph-Sheppard program throughout the Federal government. As such, it is inevitable that there will be some incursion by that department in matters traditionally handled by other agencies. The Department of Health, Education, and Welfare,

> however, has the expertness and the sensitivity to the problems inherent in the blind vendor program which may be lacking in other agencies. If the program is to be coordinated, well run, and consistent, it must have a coordinator. The only possible choice for this function is HEW.

Senate Report 93-937, at pp. 16 and 19 (J.A. 157).

Although the Secretary of Education's responsibilities under the Randolph-Sheppard Act are wide and varied, one of the principal responsibilities which the Secretary is charged with under the Act is the oversight and administration of the arbitration grievance mechanism under 20 U.S.C. § 107d-1 and § 107d-2 when a dispute arises between a blind vendor and a State or between a State and a federal agency.

> The Secretary is to prescribe such other regulations as are necessary to carry out the provisions of the Act. Further Secretarial responsibilities under S. 2581 include . . . convening of arbitration panels to hear disputes betwen blind licensees and State agencies, and between State agencies and Federal agencies, and payment of arbitration costs.

Senate Report 93-937, at p. 4 (J.A. 157).

For whatever reason, however, the Secretary of Education has been strangely silent in the case at bar, and in many other instances, when the SLAs seek to enforce the Act against federal agencies. Because the actions of the DVA in the case at bar amount to a limitation on the placement or operation of a blind vending stand at the VAMC, it is indeed peculiar that the Secretary of Education was never consulted pursuant to 20 U.S.C. § 107(b), which latter section provides in pertinent part:

> Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the

> Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

Shortly after the Act was adopted into law, the Secretary of Education's predecessor had no difficulty construing the meaning of the foregoing provision. According to the Secretary, at 42 Fed. Reg. 15807 (1977):

> When a federal property managing department or agency believes [there should be a limitation on the operation of a vending facility], the head of that department or agency *must* justify his position to the Secretary of Health, Education, and Welfare, who will make the final determination [Emphasis supplied].

If Congress is urged not to adopt a particular provision in a law, but nevertheless does enact same into law, the Congress is presumed to have specifically rejected the suggestions urged upon it. According to 2B Sutherland, supra, at § 49.10, p. 76:

> [Where] practical and contemporaneous interpretation [of a statute] has been called to a legislature's attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive evidence of its correctness.

In this case, a number of witnesses urged Congress, sometimes strenuously, to delete the requirement that federal property managers would have to seek a determination from the Secretary of Education as to whether the placement or operation of a blind vending facility adversely affects the interests of the United States under 20 U.S.C. § 107(b). The Administration's representative, Mr. Reedy, strongly testified in 1973 against allowing the Secretary of Education to make such determinations: "Responsibility for this finding should, however, rest with the head of the appropriate agency in consultation with the Secretary [of Education] and should not rest with the Secretary [of Education] alone." *Hearings before the*

SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2581, supra, at p. 38.

In fact, the opposition in 1973 before the Subcommittee to the Secretary of Education's power to make 20 U.S.C. § 107(b) determinations was more strenuous than opposition to the arbitration procedures under 20 U.S.C. §§ 107d-1 and 107d-2. *Id.* The Defense Department was particularly outspoken in its opposition to allowing the Secretary of Education to make a 20 U.S.C. § 107(b) determination. *Hearings before the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2851*, pp. 100-101.

There was similar strong opposition from other federal agencies to vesting 20 U.S.C. § 107(b) powers exclusively in the Secretary of Education throughout the foregoing 1973 Hearing Transcript. *Senate Report* No. 93-937, at p. 19 (J.A. 147, *et seq.*) makes it clear the extent of the protests to vesting in the Secretary of Education the power he now possesses under 20 U.S.C. § 107(b):

> In addition, agency witnesses expressed concern about the interference of one Federal agency in the affairs of another. The committee believes that the Department of Health, Education and Welfare [now the Secretary of Education] should be the overseer of the Randolph-Sheppard program throughout the Federal government. As such, it is inevitable that there will be some incursion by that department in matters traditionally handled by other agencies.

Nevertheless, the Congress provided precisely what it was so strongly urged not to provide in 20 U.S.C. § 107(b). In *Boudette v. Barnette*, 923 F.2d 754, 756-757 (9th Cir. 1991), the court applied the doctrine of *expressio unius est exclusio alternius* to determine the meaning of a statute:

> This doctrine [*expressio unius est exclusio alternius*] as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions

> should be understood as exclusions. . . . Thus, if a statute states that a party can invoke an action by request, such request is presumed the exclusive manner in which the action may be invoked.

The DVA has acknowledged the Act applies to it (J.A. 169; 170; 205). The NCSAB and NASW are completely at a loss to explain why the Secretary of Education was not consulted pursuant to 20 U.S.C. § 107(b) in the case at bar concerning the attempt of the DVA to limit the placement of a blind vending facility at the VAMC. Perhaps this Court can determine a method by which to more appropriately involve the Secretary of Education, thus benefiting both the blind citizens of this Country and the States which are now burdened with the responsibility of enforcing this most difficult of Federal laws.

B. The Secretary of Education Could Obviate Many of the Enforcement Problems Presented by This Act, if His Role Were Properly Defined by This Court.

The primacy of the interpretation given to an Act of Congress by an agency charged with its enforcement is virtually hornbook law in this Country. Perhaps certain federal agencies disagree with the wisdom of the Randolph-Sheppard Act, and the interpretation of that Act by the Secretary of Education, but as this Court stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public inter-

> est are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'

Id. at 865.

The Secretary long ago concluded that under the Act any head of a federal department or agency which would essay to limit a blind vending operation on federal property must justify his position to the Secretary of Education in writing. 42 Fed. Reg. 15807. It is wrong to view the *ad hoc* arbitration panels convened by the Secretary of Education under 20 U.S.C. § 107d-1 as somehow autonomous, self-contained adjudicative bodies. The panels thus convened are clearly meant to be enforcement mechanisms of the Secretary of Education. This is undoubtedly why the Congress specified that the decisions of those panels are to be regarded as final agency action, reviewable as of right under the APA, which decisions are to be published in the Federal Register. 20 U.S.C. § 107d-2.

The NCSAB and NASW respectfully submit that it is time for the Secretary of Education to police affirmatively those panel decisions under and pursuant to the power vested in the Secretary by 20 U.S.C. § 107(b). In so doing, the Secretary can determine whether a particular panel decision is or is not in the interests of the United States, or in the interests of the States, for that matter. If the Secretary of Education is thus able to police those panel decisions, the chances of a rogue panel awarding more than is absolutely necessary to insure the civil rights of the blind will be eliminated. If the Secretary of Education thus polices panel decisions, on the other hand, the civil rights of the blind will be vouchsafed, and the possibility of "Dickinsonian *Bleak House*" litigational nightmares, such as the Eighth Circuit *Riley* decisions, will be at an end, much to the relief of the budgets and Attorneys General of the States.

Certainly, the Secretary of Education has demonstrated an ability to similarly enforce other civil rights statutes

through and by his Office of Civil Rights. *Roberts v. Colorado State Board of Agriculture,* 998 F.2d 824, 827-28 (10th Cir. 1993); *Collier v. William Penn School District,* —— F. Supp. ——, 65 USLW 2597 (E.D. Penn. Feb. 28, 1997); *Cf. Kelley v. Board of Trustees,* 35 F.3d 265, 271 (7th Cir. 1994).

Quite frankly, in the view of the NCSAB and NASW, if the intent of Congress is to be so thoroughly frustrated as it was by the holding of the Court below, then the rights of the blind and the SLAs might be better served by according to the rights of the blind under the Act the same status *vis-à-vis* federal agencies which this Court accorded to the victims of sex discrimination under Title IX in *Franklin v. Gwinnett Public Schools,* 503 U.S. 60 (1992).

CONCLUSION

For all of the foregoing reasons, the NCSAB and NASW respectfully submit that the Petitions of the MSDE and NFB for a Writ of Certiorari in the case at bar should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL FEDERATION OF THE BLIND, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE WISCONSIN ACADEMY OF TRIAL LAWYERS, THE COLORADO TRIAL LAWYERS ASSOCIATION, THE INDIANA TRIAL LAWYERS ASSOCIATION, THE IOWA TRIAL LAWYERS ASSOCIATION, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND THE SOUTHERN POVERTY LAW CENTER SUPPORTING PETITIONERS

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25 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DECISIONS OF THE COURTS BELOW AND IN *NASH* EFFECTIVELY MAKE IT IMPOSSIBLE FOR BLIND CITIZENS TO ACHIEVE PROCEDURAL DUE PROCESS WHEN SEEKING TO PROTECT THEIR VESTED PROPERTY INTERESTS	5
A. The Private Interests Which Are Affected by the Actions of Federal Agencies Such as the DVA Are Substantial	6
B. Given the Decisions of the Courts Below and the *Nash* Court, the Risk of an Erroneous Deprivation of the Property Rights of Blind Vendors Is Very Great, and the Probable Value of the Substitute Procedural Safeguards Suggested Below Are Very Low	8
C. The Government's Interest in Not Vesting Remedial Powers in the Randolph-Sheppard Panels Is Insubstantial	11
II. THE DISTRICT COURT DECISION, AFFIRMED BY THE COURT OF APPEALS BELOW, IS FUNDAMENTALLY FLAWED FROM THE PERSPECTIVE OF BOTH PROCEDURAL AND CONSTITUTIONAL LAW	12
A. The District Court Did Not Dispose of This Case in a Manner Which Is Appropriate Under the Federal Rules of Civil Procedure or Permitted Under the Administrative Procedure Act	13

TABLE OF CONTENTS—Continued

Page

B. The Decisions of the District Court and the Court of Appeals Below Effectively Have Closed the Courthouse Doors to Judicial Review of a Randolph-Sheppard Arbitration Decision 16

III. AS MATTERS STAND, IT WOULD BE PREFERABLE TO HAVE A JUDICIAL REMEDY FASHIONED BY THIS COURT RATHER THAN HAVE THE RIGHTS OF THE BLIND SUBJECT TO A DEFECTIVE ARBITRATION PROCEDURE 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 16
Arnett v. Kennedy, 416 U.S. 134 (1974) 6
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 18
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 6
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14
Delaware Department of Health and Social Services v. United States Department of Education, 772 F.2d 1123 (3rd Cir. 1985) 10
FTC v. Cement Institute, 333 U.S. 683 (1948) 16
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 18
Georgia Department of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990) 3, 4, 5
Goldberg v. Kelly, 397 U.S. 254 (1970) 6, 7
Maryland State Department of Education v. United States Department of Veterans Affairs, 896 F.Supp. 513 (D. Md. 1995) 10, 13, 15
Maryland State Department of Education v. United States Department of Veterans Affairs, 98 F.3d 165 (4th Cir. 1996) 9
Mathews v. Eldridge, 424 U.S. 319 (1976) 5, 6, 11
Minnesota Department of Jobs & Training v. Riley, 18 F.3d 606 (8th Cir. 1994) 10
Minnesota Department of Jobs & Training v. Riley, 107 F.3d 648 (8th Cir. 1997) 10, 18, 19
Morrissey v. Brewer, 408 U.S. 471 (1972) 6
Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986) 4, 9

Statutes and Rules

5 U.S.C. § 701 16
5 U.S.C. § 706(2)(A) 13
20 U.S.C. § 107 3
20 U.S.C. § 107(b) 7, 12
20 U.S.C. § 107a(b) 7
20 U.S.C. § 107b 11

TABLE OF AUTHORITIES—Continued

	Page
20 U.S.C. § 107b(2)	7
20 U.S.C. § 107b(3)	7
20 U.S.C. § 107b(6)	7
20 U.S.C. § 107d-1	*passim*
20 U.S.C. § 107d-1(a)	3, 15
20 U.S.C. § 107d-1(b)	3, 4, 12
20 U.S.C. § 107d-2	7, 8, 9
20 U.S.C. § 107d-2(a)	16, 18
20 U.S.C. § 107d-3(a)	7
20 U.S.C. § 107-1(b)	3
34 C.F.R. § 395.30	6
34 C.F.R. § 395.31	6
34 C.F.R. § 395.32	8, 12
34 C.F.R. § 395.35	9, 12
34 C.F.R. § 395.36	9, 12
34 C.F.R. § 395.4	7
34 C.F.R. § 395.5	7
34 C.F.R. § 395.5(5)	8
34 C.F.R. § 395.6	7, 8
34 C.F.R. § 395.7	7
34 C.F.R. § 395.8	7, 8
34 C.F.R. § 395.9	8
34 C.F.R. § 395.10	8
34 C.F.R. § 395.11	7

Other Authorities

Sup. Ct. R. 37	2
Sup. Ct. Order of January 21, 1963, amending Fed. R. Civ. P. (Dissent of Justices Black & Douglas)	14
Administrative Procedure Act	13, 14, 15, 16
Randolph-Sheppard Act	16
Senate Report 93-937	18

IN THE

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OCTOBER TERM, 1996

Nos. 96-1550 and 1551

THE NATIONAL FEDERATION OF THE BLIND, DONALD J. MORRIS, and MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* THE WISCONSIN ACADEMY OF TRIAL LAWYERS, THE COLORADO TRIAL LAWYERS ASSOCIATION, THE INDIANA TRIAL LAWYERS ASSOCIATION, THE IOWA TRIAL LAWYERS ASSOCIATION, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND THE SOUTHERN POVERTY LAW CENTER SUPPORTING PETITIONERS

This Brief *Amici Curiae* of the Wisconsin Academy of Trial Lawyers,[1] Colorado Trial Lawyers Association, Indiana Trial Lawyers Association, Iowa Trial Lawyers Association, Michigan Trial Lawyers Association, Associa-

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[1] In accordance with Supreme Court Rule 37.4 this brief has primarily been authored by counsel for the Wisconsin Academy of Trial Lawyers with assistance from the other named *Amici*. No other entity has made a monetary contribution to the preparation or submission of the brief.

tion of Trial Lawyers of America, and the Southern Poverty Law Center is submitted pursuant to Supreme Court Rule 37 and has been consented to by the Office of the Solicitor General pursuant to a letter dated May 28, 1996 and by counsel for the Petitioners.

STATEMENT OF INTEREST

The Trial Lawyers represent trial attorneys across the United States who are dedicated primarily to the rights of tort victims. The Trial Lawyers are dedicated to the rule of law and seek to insure that the Justice system in this Nation functions in a manner calculated to insure fundamental fairness for tort victims according to the precepts of Constitutional Law.

Founded in 1971, the Southern Poverty Law Center is a nonprofit organization dedicated to protecting victims of injustice. The Center has brought countless civil rights cases on behalf of minorities, women, poor people in need of health care, mentally ill persons, children in foster care, prisoners and many other persons subject to unfair treatment based on their membership in a disadvantaged group. *Amici* has an interest in this case because it is committed to ensuring that all persons receive the benefits to which they are entitled under federal law.

STATEMENT OF THE CASE

The *Amici* adopt by reference the Statements contained in the Petitions for a Writ of Certiorari filed in this case by the Maryland State Department of Education, Division of Rehabilitative Services ("MSDE") and the National Federation of the Blind ("NFB").

SUMMARY OF ARGUMENT

Blind vendors operating pursuant to the Randolph-Sheppard Act in the Fourth and Eleventh Circuits face a substantial risk of erroneous deprivation of their private property rights without due process safeguards. By limiting these vendors to arbitration panels whose findings are unenforceable, the Courts below have effectively reduced the constitutional rights of these blind individuals.

In addition, the District Court's decision has inappropriately disposed of this case by disregarding the tenets of the Federal Rules of Civil Procedure and the Administrative Procedure Act effectively closing the courthouse doors to judicial review of a Randolph-Sheppard arbitration decision.

ARGUMENT

The *Amici* respectfully submit that certain blind citizens in this Nation have been in many instances unfairly and unconstitutionally deprived of basic Procedural Due Process in terms of how their rights are adjudicated under the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.* (the "Act"). The latest and most egregious manifestation of the low regard that some federal agencies have for the rights of these blind vendors is to be found within the four corners of the decision of the Court below.

Blind vendors operating on Federal property pursuant to the Act have no options available to them when their livelihood is threatened. The only mechanism provided to resolve any infringement of the vendors' rights is arbitration. In fact, by the terms of 20 U.S.C. § 107-1, a blind vendor working on federal property does not even have the right to proceed directly against a federal agency that is acting in violation of his or her civil rights.

If a blind citizen working on Federal property as a vendor objects to actions of the federal agency charged with administering that property, that blind citizen must rely on the good faith and diligence of a state licensing agency ("SLA"), such as the MSDE, to make an effort to vindicate that citizen's rights by arbitration under § 107d-1(b). Presumably, if a federal agency fails to provide to a blind vendor adequate heat, electricity, or protection from harassment in the workplace by the terms of 20 U.S.C. § 107d-1(a), the most that a blind vendor can do is encourage, by arbitration if necessary, an SLA to take action on his or her behalf. In *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990), the Court found that:

> [20 U.S.C. § 107d-1] (a)'s broad language would still entitle the vendor to invoke the remedial procedures provided in that subsection *but only in order to exercise his procedural right to complain.* Although this procedural right gives the vendor no substantive remedy, the right is not entirely empty. It guarantees the vendor *an opportunity to convince the state agency to take action*—to file a complaint pursuant to subsection (b)—even though the agency has discretion not to act. [Emphasis supplied].

Id. at 1488.

Although harsh, the decision in *Nash* did not leave a blind vendor completely without recourse. If a diligent and responsible SLA, such as the one in the case at bar, determined that a federal agency was acting in contravention of the civil rights of a blind citizen working on that agency's property, that SLA could still pursue a remedy against such an agency under 20 U.S.C. § 107d-1(b). At least that appeared to be the case until the decision of the Courts below in the case at bar. Relying on *Nash*, the Court below affirmed the District Court's conclusion that a 20 U.S.C. § 107d-1(b) panel had no remedial powers whatsoever.

As a result, blind vendors, in the Fourth and Eleventh Circuits at least, have nowhere to turn in the event that they find themselves aggrieved by the action of a federal agency charged with administering property where they make a living. They cannot commence a civil action in any court because the arbitration mechanism established to resolve disputes involving "any action arising from the operation or administration of the vending facility program [20 U.S.C. § 107d-1(a)]" has been held to be the exclusive method for resolving such disputes. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 102-103 (D.C. Cir. 1986).

Although the clear import of the decisions below and the decision in *Nash* is that an arbitration panel under the Act has no remedial power, the Courts below have gone

further than *Nash* and have effectively closed the courthouse door to any effort to secure judicial review of those panel decisions. The foregoing is particularly troubling because, as noted in the NFB's Petition in this case, the Randolph-Sheppard Act is a federal statute that creates a property interest in the blind who must make their living on Federal property. *Petition of the NFB for a Writ of Certiorari*, p. 20-21.

I. THE DECISIONS OF THE COURTS BELOW AND IN *NASH* EFFECTIVELY MAKE IT IMPOSSIBLE FOR BLIND CITIZENS TO ACHIEVE PROCEDURAL DUE PROCESS WHEN SEEKING TO PROTECT THEIR VESTED PROPERTY INTERESTS.

This Court has carefully established the essential parameters and minimum guarantees of Procedural Due Process in a number of cases. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court emphasized:

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v McDonnell, 418 US 539, 557-558, 41 L Ed 2d 935, 94 S Ct 2963, 71 Ohio Ops 2d 336 (1974). See, e.g., Phillips v Commissioner, 283 US 589, 596-597, 75 L Ed 1289, 51 S Ct 608 (1931). See also Dent v West Virginia, 129 US 114, 124-125, 32 L Ed 623, 9 S Ct 231 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, . . . is a principle basic to our society." Joint Anti-Fascist Comm. v McGrath, 341 US 123, 168, 95 L Ed 817, 71 S Ct 624 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v Manzo, 380 US 545, 552, . . .

Id. at 333.

This Court has made it clear that " 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."

Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether administrative procedures are Constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy*, 416 U.S. 134, 167-68 (1974).

In reliance on *Goldberg v. Kelly*, 397 U.S. 254, 263-271 (1970), this Court stated in *Mathews v. Eldridge*, *supra*:

> . . . [O]ur prior decisions indicated that identification of the specific dictates of due process generally requires consideration of three distinct facts; First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-335.

Applying this litmus test, it is clear that significant Procedural Due Process protections ought to be available to blind vendors under the Act.

A. The Private Interests Which Are Affected by the Actions of Federal Agencies Such as the DVA Are Substantial.

The private property interests of the blind, and the SLAs for that matter, are substantial. In order to insure that blind licencees have employment opportunities, the Act authorizes SLAs to secure space on property owned by federal agencies sufficient to accommodate blind vendor stands. *See, e.g.*, 34 C.F.R. § 395.30 and § 395.31. A

blind vendor who secures a license from an SLA to operate a blind vending stand on Federal property in effect receives a license to operate a small private business enterprise in partnership with an SLA under the authority of 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7. The blind licensee does not have a completely free hand to run this business any way he sees fit. For example, 20 U.S.C. § 107d-3(a) allows an SLA to place a ceiling on the amount of income that a blind licensee can receive from vending machines on Federal property. *Cf.* 34 C.F.R. § 395.5 and § 395.8.

However, the blind licensee is given incentives and the ability to succeed as a small business owner which offset any limitations on the licensee's opportunities. Pursuant to 34 C.F.R. § 395.11, SLAs are required to provide vocational and other training services to blind vendors, including on-the-job training in all aspects of vending facility operation. Moreover, each SLA must, in issuing licenses for the operation of blind vending facilities on Federal property, give preference to blind persons in need of employment. 20 U.S.C. § 107a(b).

The resulting blind business operation clearly constitutes a property right of the blind licensee who works on Federal property, not unlike the property interests at issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970). These property interests are defined clearly in 20 U.S.C. § 107b(2) and (3).

Obviously, Congress recognized the need for Due Process protection of the property rights thus created, because, in addition to the provisions of 20 U.S.C. §§ 107d-1 and 107d-2, Congress specified in § 107b(6) that "any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program [must have] an opportunity for a *fair hearing* [emphasis supplied]" and then made a pointed cross-reference to § 107d-1.

There are other equally compelling reasons to conclude that the private interests of blind vendors working on Federal property are substantial and require protection by recourse to some form of a fair hearing dispute resolution mechanism. Blind vendors earn money which is subject to control by state licensing agencies (34 C.F.R. § 395.8 and § 395.9) and federal property managers (34 C.F.R. § 395.32). The working conditions and other conditions of employment of the blind vendor working on Federal property are also regulated in detail by SLAs. 34 C.F.R. § 395.6 and § 395.10. In this regard, a state licensing agency is, in fact, authorized to assume some of the responsibilities customarily performed by an employer *vis-a-vis* a blind vendor. For example, a state licensing agency is authorized to set aside funds from the net proceeds of the operation of vending facilities for the purposes of "the establishment . . . of retirement and pension funds, health insurance contributions, and provisions for paid sick leave and vacation time . . . ." 34 C.F.R. § 395.5(5).

B. Given the Decisions of the Courts Below and the *Nash* Court, the Risk of an Erroneous Deprivation of the Property Rights of Blind Vendors Is Very Great, and the Probable Value of the Substitute Procedural Safeguards Suggested Below Are Very Low.

The *Amici* first take note of the arguments made in Section III of the *Amicus Curiae* Brief of the National Council of State Agencies for the Blind ("NCSAB") in the case at bar. The Randolph-Sheppard Act not only creates and vests property rights in blind vendors working on Federal property, but the arbitration mechanism in 20 U.S.C. §§ 107d-1 and 107d-2 is the only vehicle for vindicating the personal civil rights of those blind vendors. As noted in the NCSAB Brief *Amicus Curiae,* neither the EEOC nor any other federal agency has jurisdiction to vindicate those rights. Indeed, Congress mandated that SLAs and Federal property managers

must cooperate to insure compliance with civil rights and other laws by blind vendors on Federal property. 34 C.F.R. § 395.35 and § 395.36. Against that background, the Trial Lawyers respectfully ask the Court to consider the following.

As noted by the Court below, the Randolph-Sheppard Act is an employment act designed "to 'provid[e] blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting.' " *Maryland State Department of Education, Division of Rehabilitative Services v. U.S. Department of Veterans Affairs*, 98 F.3d 165, 167 (4th Cir. 1996) (the decision below). The Court below acknowledged that Congress enacted 20 U.S.C. § 107d-1 and § 107d-2 " 'to provide the means by which aggrieved [blind] vendors and State agencies may obtain a final and satisfactory resolution of disputes.' " *Id.* at 171.

The only forum available for the vindication of the rights of the blind under the Act is an *ad hoc* arbitration panel convened by the Secretary of Education pursuant to 20 U.S.C. § 107d-1. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 102-103 (D.C. Cir. 1986).

In direct disregard of the decision in *Weinberger*, and a number of other decisions of other Courts from other Circuits,[1] the Court of Appeals below affirmed the District

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[1] According to the Court in *Weinberger*:

> Surely, Congress contemplated that disputes between state agencies and government agencies could involve contract awards, such as the one at issue here. *Congress nevertheless set up an arbitration scheme instead of authorizing direct resort to federal court. As Justice Brandeis stated the "well settled" rule: "where a statute creates a right and provides a special remedy, that remedy is exclusive."* United States v. Babcock, 250 U.S. 328, 331, 39 S.Ct. 464, 465, 63 L.Ed. 1011 (1919) (citations omitted). Thus, where Congress has created an

Court's holding that an arbitration panel convened pursuant to 20 U.S.C. § 107d-1 "has no remedial powers whatsoever." *Maryland State Department of Education, Division of Rehabilitative Services v. U.S. Department of Education*, 896 F. Supp. 513, 517 (D. Md. 1995) (the District Court decision below). The Court of Appeals below further affirmed the District Court and held that an award of an arbitration panel convened under the Act to resolve a dispute between an SLA and a federal property manager could not be enforced in Federal Court. 98 F.3d at 168.

While the District Court below stated that it was clear that the Randolph-Sheppard Act applied to the DVA and the VCS (896 F. Supp. at 515, n.7), the District Court below nevertheless concluded:

> This Court finds itself in agreement with [the decision in *Nash*] . . . that '[a 20 U.S.C. § 107d-(b)] panel . . . [by] the Act's express terms, *has no remedial powers whatsoever.* It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself.' *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482, 1492 (5th Cir. 1990). [Emphasis supplied].

896 F. Supp. at 517. In affirming the decision of the District Court on October 22, 1996, the Court of Appeals below stated:

> While it may have been wiser for Congress to have provided for an automatic review of the remedial

---

arbitration scheme as the administrative method for enforcing a statutory right, there is a strong presumption that it is exclusive [Emphasis supplied].

See, also, Delaware Department of Health and Social Services, 772 F.2d 1123 (3rd Cir. 1985); *Minnesota Department of Jobs & Training v. Riley*, 18 F.2d 681 (8th Cir. 1994); *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997). Other decisions to the same effect are cataloged at pp. 10-11 of the NFB's *Petition for a Writ of Certiorari.*

> steps taken by a federal entity in response to an arbitration decision, *the fact that Maryland is left without such a review* is not 'so gross as to shock the general moral or common sense.' [Emphasis supplied].

98 F.3d at 170-171.

The Trial Lawyers submit that the course charted by the Courts below and by the *Nash* Court, within the terms of *Mathews v. Eldridge*, *supra*, entails a very substantial "risk of an erroneous deprivation (424 U.S. at 335)" of the private civil and property rights of blind citizens who must work on Federal property. By contrast the "substitute procedural safeguards (424 U.S. at 335)" suggested by the Courts below and *Nash* hold little "probable value" because vesting authority to administer a remedy in the head of an offending federal agency in itself violates Procedural Due Process, as detailed by the NFB in its Petition. *NFB Petition for a Writ of Certiorari*, pp. 19-22.

C. The Government's Interest in Not Vesting Remedial Powers in Randolph-Sheppard Panels Is Insubstantial.

The DVA has not articulated any substantial reason why the arbitration panels should be without remedial powers, other than to say that such a conclusion is consistent with the holding in *Nash*. The DVA has suggested in the Court below that blind vending facilities may compete with the Veterans Canteen Service ("VCS"), and it has further suggested that a blind vending facility might compromise the integrity of VAMC's medical mission. However, whatever the objections of the DVA to a blind vending facility, there is no indication that the DVA ever attempted to obtain approval from the agency charged with administering the Randolph-Sheppard Act for the actions which it has taken in the case at bar under 20 U.S.C. § 107(b), which provides:

> Any limitation on the placement or operation of a vending facility based on a finding that such place-

> ment or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination along with supporting documentation, in the Federal Register.

Because the DVA has never even attempted to seek such approval, it is in a poor position to argue that the arbitration panel decision below is unreasonable. Indeed, as suggested in the Brief *Amicus Curiae* of the NCSAB in the case at bar, the more active involvement of the Secretary of Education under 20 U.S.C. § 107(b) may ameliorate any perceived problems with vesting remedial powers in panels convened under the Act and may well have made this present litigation unnecessary.

The refusal of the DVA to acknowledge the remedial powers of a 20 U.S.C. § 107d-1(b) panel is especially troubling when it is remembered: a) Congress mandated that state licensing agencies and federal property managers must cooperate to insure compliance with civil rights and other laws by blind vendors on Federal property. 34 C.F.R. § 395.35 and § 395.36; and b) At least in part, federal property managers such as the DVA have the right to exercise control over income belonging to blind vendors (34 C.F.R. § 395.32), which right obviously carries with it fiduciary responsibilities.

II. THE DISTRICT COURT DECISION, AFFIRMED BY THE COURT OF APPEALS BELOW, IS FUNDAMENTALLY FLAWED FROM THE PERSPECTIVE OF BOTH PROCEDURAL AND CONSTITUTIONAL LAW.

There are a host of respects in which the decisions of the Courts below are deficient and directly affect the Due Process rights of the blind.

The Trial Lawyers respectfully submit that the Courts below have misread and misapplied the provisions of the Administrative Procedure Act (APA) in the case at bar to the procedural and substantive detriment of the blind citizens who must make their living on Federal property. In order to place this argument in proper perspective, it is necessary to analyze the precise holding of the District Court below.

A. The District Court Did Not Dispose of This Case in a Manner Which Is Appropriate Under the Federal Rules of Civil Procedure or Permitted Under the Administrative Procedure Act.

The District Court was clearly frustrated by the failure of the MSDE and the DVA to reach a settlement in the case at bar. 896 F. Supp. at 515-516. The District Court noted that the MSDE had objected to a suggestion that the District Court hold a *de novo* evidentiary hearing, because only the arbitration panel could hold such a hearing. *Id.* Because of the MSDE's objection, the District Court did not hold a hearing, and did not remand this matter to the arbitration panel for a further evidentiary hearing.

The case was before the District Court on cross-motions for summary judgment. 896 F. Supp. at 515-516. The District Court, having been asked by the MSDE to review the arbitration decision under the APA, stated in this regard:

> . . . [W]hether this Court proceeds under the APA or under its equity powers, this Court runs into the same problem, namely that there exist relevant and material issues of disputed fact concerning whether the [DVA] Secretary's June 1, 1995 Order lacks a "rational basis" or that the Secretary's actions in issuing that Order were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. Sec. 706(2)(A).

Id. at 517-518.

The Trial Lawyers respectfully submit that the foregoing highlights two difficulties with the decision of the District Court.

First, the District Court granted summary judgment in favor of the DVA despite the fact that there were "relevant and material issues of disputed fact" which were unresolved in the case at bar. In so doing, the District Court disposed of this case in a manner that is inconsistent with one of the fundamental tenets of summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). As Justices of this Court have observed, the Federal Rules of Civil Procedure are closely related to substantive rights and Procedural Due Process.[2] The manner in which the District Court disposed of the case at bar creates at least the appearance of judicial indifference to adherence to proper procedure when adjudicating the civil rights of the blind, and may have unintended consequences for those rights in other circumstances. While this Court is not primarily an error-correcting tribunal it should address such an impression of procedural indifference.

Second, and far more important, the District Court was manifestly confused about the Court's responsibility under the APA in the case at bar. Throughout its decision, the District Court was under the impression that it was being called upon to review the actions of the Secretary of Veterans Affairs under the APA. For example, after identifying the DVA as the author of a June 1, 1995 Order (896 F. Supp. 515), the District Court states, "Were this Court required to reach the APA issue, . . . this Court would find that the [MSDE] has not established

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[2] *See Dissent of Justices Black & Douglas* to the Order of January 21, 1963 Amending the Rules of Civil Procedure, and *Dissent of Justice Black* to the Order of February 28, 1966 Amending The Federal Rules of Civil Procedure, as reprinted in *Federal Civil Judicial Procedure and Rules*, pp. 29-34 (West 1997).

a) that the Secretary has acted in an 'arbitrary or capricious' manner or b) that the Secretary's June 1, 1995 Order otherwise violates Sec. 706 of the APA." 896 F. Supp. 517.

In fact, the APA review mandated by 20 U.S.C. § 107d-1(a) is for the action of the Secretary of Education, by and through the arbitration panel he convened under 20 U.S.C. § 107d-1. The Department of Education administers the Randolph-Sheppard Act, and the DVA is an administratee, not an administrator under the Act.

The District Court's error in concluding that the acts of the DVA Secretary are to be reviewed under the APA, undoubtedly helped move the Courts below and the *Nash* Court in the direction of concluding that it was and is the head of a federal agency who must administer and apply the remedy under the Act. According to the District Court:

> It is in that context that this Court finds itself in agreement with [*Nash*] Chief Judge Tjoflat's view that '[t]he [20 U.S.C. § 107d-1] (b) panel . . . under the Act's express terms, has no remedial powers whatsoever. It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself.'

Id. at 517.

It is precisely the error of concluding that the actions of the DVA Secretary, instead of the actions of the Education Secretary, are the subject of APA review which the NFB addresses at pp. 20-22 of its *Petition for a Writ of Certiorari* in the case at bar. As the NFB argues, the decision of the Courts below have created a Constitutional problem where none existed before by finding that a party to an arbitration panel adjudication is to be the one who administers the remedy for a violation found to exist by that panel.

The Department of Education administers the Randolph-Sheppard Act, and the DVA is an administratee, not an administrator under the Act. Nor is this case subject to the analysis in *FTC v. Cement Institute*, 333 U.S. 683 (1948), where the Court endorsed an administrative procedure that included the opportunity to produce evidence, testimony, cross-examination and argument to the decision maker.

B. The Decisions of the District Court and the Court of Appeals Below Effectively Have Closed the Courthouse Doors to Judicial Review of a Randolph-Sheppard Arbitration Panel Decision.

To the *Amici* it is inconceivable that the Courts below have effectively closed the courthouse doors completely to an SLA's efforts, to vindicate the rights of the blind by seeking judicial review in Federal Court.

A decision such as the one below disregards entirely the clear and obvious mandate of 20 U.S.C. § 107d-2(a), which latter provision provides in pertinent part that an arbitration panel convened under the Act:

> . . . shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision *which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.* [Emphasis supplied].

This Court has made it clear that under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, a party aggrieved or adversely affected by a final agency action has an almost absolute right to judicial review of such an action. In *Abbott Laboratories v. Gardner*, 387 U.S. 1339-41 (1967), this Court observed:

> [A] survey of our cases shows that judicial review of a final agency action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . discretion, 5 USC § 701(a).

> . . . The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 USC § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. Shaughnessy v Pedreiro, 349 US 48, 51, 99 L ed 868, 873, 75 S Ct 591; see United States v Interstate Commerce Comm'n, 337 US 426, 433-435, 93 L ed 1451, 1459, 1460, 69 S Ct 1410; Brownell v Tom We Shung, supra; Heikkila v Barber, supra. Again in Rusk v Cort, supra, 369 US at 379-380, 7 L ed 2d at 816, 817, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the court's restrict access to judicial review.

In refusing to enforce the decision of the arbitration panel in the case at bar, the Court below closed the courthouse doors to judicial review of a final agency action, which is directly contrary to the settled practice of this Court.

In the case of arbitration panels convened pursuant to 20 U.S.C. § 107d-1, there is "persuasive," indeed irrefutable, reason to believe that Congress intended that the award of such a panel would be subject to judicial review. The decision of the Court below not only effectively denies blind citizens Procedural Due Process; it is directly contrary to what this Court has recognized as the policy of Congress in enacting legislation:

> 'Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or

> to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.' S Rep No. 752, 79th Cong., 1st Sess, 26 (1945).

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 671 (1945).

This Court has stated that where substantial doubt about Congressional intent exists, the general presumption favoring judicial review of administrative action is controlling. Here, there is manifest evidence that Congress specifically intended that the final agency actions of the Secretary of Education, by and through the arbitration panels convened under the Act, were to be reviewable under the APA, as is clear from the face of 20 U.S.C. § 107d-2(a).

III. AS MATTERS STAND, IT WOULD BE PREFERABLE TO HAVE A JUDICIAL REMEDY FASHIONED BY THIS COURT RATHER THAN HAVE THE RIGHTS OF THE BLIND SUBJECT TO A DEFECTIVE ARBITRATION PROCEDURE.

The blind are either forced to endure unending litigation such as that in the Eighth Circuit [8] or must face the prospect of having no effective and efficient method to redress their rights, as is the case under the decisions of the Courts below and *Nash*. The *Amici* submit that it would be better for this Court to fashion a remedy for the blind, as it did for the victims of sex discrimination in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), than to allow the civil rights of the blind to be thus abused.

In *Senate Report 93-937*, p. 20 (J.A. 157), the Committee on Labor and Public Welfare stated as follows, in a section entitled "Arbitration and Judicial Review:"

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[8] *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997).

> The bill creates two new sections of the Act which establish the machinery for a *grievance resolution procedure*. . . . The Committee considers the arbitration procedures contained in S. 2581 to be valuable tools for the *resolution of disputes*. Under current circumstances, machinery for *prompt and satisfactory disposition* of blind licensee and state agency *complaints* does not exist. . . . The Comptroller General's Report [reproduced in full in the Addendum to this Brief] states that HEW and state agencies are still *without recourse* from decisions of federal agencies regarding blind vendor facilities on property they control. Moreover, *blind vendors have attempted to bring their grievances to the judicial system* for resolution. In the case of *Wilson v. Blount*, for example, the U.S. District Court . . . held that the plaintiff blind vendor had no standing to challenge the legal basis of the decision of the Postmaster General. . . . *It is the expectation of the Committee that the arbitration and review procedures adopted in S. 2581 will provide the means by which aggrieved vendors and state agencies may obtain a final and satisfactory resolution of disputes.* [Emphasis supplied].

What has happened in the Eighth Circuit cannot be characterized in any sense as a prompt and satisfactory disposition of the blind vendor's grievances in that case.[4] What happened in the case at bar likewise cannot be characterized as a superior method of achieving a final and satisfactory resolution of a dispute under the Act. If the efforts of Congress to achieve a fair hearing for blind citizens who must make their living on Federal mandates concerning Procedural Due Process, were insuffi-

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[4] "Nine years later, the [Veterans Administration] is still at it, demanding the right to install machines that would, as the district found, destroy the blind vendor's livelihood. It is time for the [Veterans Administration's] scorched-earth campaign to end." *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997).

cient, then perhaps this Court can find some other way to vouchsafe the personal civil rights and property rights of blind citizens who must make their living on Federal property.

CONCLUSION

Based on the foregoing the *Amici* respectfully request that the Court grant the Petition for Writ of Certiorari of the National Federation of the Blind and Maryland State Department of Education, Division of Rehabilitation Services.

Respectfully submitted,

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Nos. 96-1550 and 96-1551

In the Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
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THE NATIONAL FEDERATION OF THE BLIND, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

MARYLAND STATE DEPARTMENT OF EDUCATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* COMMONWEALTH OF VIRGINIA AND STATES OF COLORADO, ILLINOIS, MISSISSIPPI AND RHODE ISLAND IN SUPPORT OF PETITIONERS

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21 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE RANDOLPH-SHEPPARD ACT AND THE FOURTH CIRCUIT DECISION	4
II. THE FOURTH CIRCUIT'S DECISION IGNORES MUCH OF THE LANGUAGE OF THE ACT AND IS CONTRARY TO CONGRESS' INTENT	8
III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN INTER-CIRCUIT CONFLICT	14
CONCLUSION	17

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Crooks v. Harrelson, 282 U.S. 55 (1930) 13
Delaware Department of Health and Social Services v. U.S. Department of Education, 772 F.2d 1123 (3rd Cir. 1985) 11, 15
FDIC v. Meyer, 510 U.S. 471, ——, 114 S. Ct. 996, 1001 (1994) 12
Georgia Department of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990) 7-9, 14-15
Gramling v. Food, Machinery & Chemical Corp., 151 F. Supp. 853 (W.D.S.C. 1957) 11
Hudson v. Boxer, 632 F. Supp. 1569 (D. Colo. 1986) 15
La Vale Plaza v. Noonan, 378 F.2d 569 (3rd Cir. 1967) 11
Maryland State Department of Education v. U.S. Department of Veterans Affairs, 98 F.3d 165 (1996) ..... 2, *passim*
Minnesota Department of Jobs and Training v. Riley, 107 F.3d 648 (8th Cir. 1997) 8, 14-15
NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 12
Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986) 14
United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 11
United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) 11

FEDERAL STATUTES

34 C.F.R. §§ 395.4, 395.5, 395.6 ..... 2, 11
34 C.F.R. § 395.7 11
34 C.F.R. § 395.9(5) 11
34 C.F.R. § 395.11 11
5 U.S.C. § 702 12
20 U.S.C. §§ 107, *et seq.* (Randolph-Sheppard Act) ..... 1, *passim*
Pub. L. No. 93-516, § 202, 88 Stat. 1623 5
Pub. L. No. 83-565, Ch. 655, 68 Stat. 663 (1954) 4

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
S. Rep. No. 93-937, *reprinted in* 1974 U.S.C.C.A.N. 6373	13
Randolph-Sheppard Act for the Blind Amendments of 1973, Hearings Before the Subcommittee on the Handicapped of the U.S. Senate Committee on Labor and Public Welfare, 93d Cong., 1st *Sess., on S. 2581* (1973)	5

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BRIEF FOR *AMICI CURIAE* COMMONWEALTH OF VIRGINIA AND STATES OF COLORADO, ILLINOIS, MISSISSIPPI AND RHODE ISLAND IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

The Virginia Department for the Visually Handicapped (DVH) is a State licensing agency under the Randolph-Sheppard Act, 20 U.S.C. §§ 107, *et seq.* (the "Act").

Each such state licensing agency is responsible for licensing blind vendors seeking positions in federal installations in its state and for protecting the interests of those vendors in seeking such positions.[1] *See generally* 20 U.S.C. §§ 107b, 107b-1; 34 C.F.R. §§ 395.4, 395.5, 395.6.

The Act allows a State licensing agency, if it determines that a federal host agency is failing to comply with the Act or its regulations, to "file a complaint with the Secretary [of Education,] who shall convene a panel to arbitrate the dispute." 20 U.S.C. § 107d-1(b). The Act also provides that "the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." *Id.* Congress intended by that provision to create a plain, speedy, and inexpensive remedy for the resolution of disputes betwen State licensing agencies and federal host agencies arising under the Act.

By holding that such arbitration panels (herein, "RSA arbitration panels") have no remedial authority, the decision below (*Maryland State Department of Education v. U.S. Department of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996)) renders that remedy illusory. If that decision remains the law in the Fourth Circuit, the mission of the Virginia Department for the Visually Handicapped will by hampered severely—both because recalcitrant federal agencies will be able to postpone the final resolution of disputes, virtually *ad infinitum*, and because the costs of pursuing such resolutions will be multiplied several times over. The States of Colorado, Illinois, Mississippi and Rhode Island join Virginia in seeking review, because they are concerned that the Fourth Circuit decision, if not corrected, could be followed by federal courts in their own jurisdictions to the prejudice of their own programs for licensing blind vendors.

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[1] Currently, there are 58 blind vendors licensed by Virginia on federal properties, 22 by Colorado, 39 by Illinois, 13 by Mississippi, and 4 by Rhode Island.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision holds that an RSA arbitration panel has no remedial authority and no authority to do anything other than "determine whether the federal entity is in violation of the Act." 98 F.3d at 169. It acknowledges and does not challenge Maryland's contention that under its reading of the Act, "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel," *id.* at 170, leaving it up to the State agency to "file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act," *id.* at 171. It thus remits enforcement of the Act, and of RSA arbitration panel decisions, to the federal agencies that have violated the Act; and it leaves enforcement of blind vendors' substantive rights to "priority" in the operation of vending facilities on federal property to the federal agencies that have violated those rights. In short, it renders the Act a toothless, unenforceable statement of aspirations. It does so by focusing narrowly on a single provision of the Act, by construing the ambiguous language of that provision as plain, and by construing that ambiguous language in a way that is contrary to the intent of Congress as manifested by the Act's language, purposes, functions and history.

The decision below is in conflict with a recent decision of the Eighth Circuit, and it reflects a deeper confusion among the lower courts regarding the proper interpretation and application of the arbitration provisions of the Act. The question presented also is of critical importance to the functioning of the Randolph-Sheppard Act, a statute that Congress enacted to provide many of our blind citizens a means of supporting themselves and becoming productive citizens and taxpayers, both for the benefit of themselves and for the good of our Nation as a whole. To settle the inter-Circuit conflict, and to hasten the demise

of an erroneous decision which now governs Randolph-Sheppard Act arbitration proceedings throughout the Fourth Circuit, the *amici* States urge the Court to grant the petitions in this case.

ARGUMENT

I. THE RANDOLPH-SHEPPARD ACT AND THE FOURTH CIRCUIT DECISION

Congress enacted the Randolph-Sheppard Act in 1936, "to 'provid[e] blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting.'" 98 F.3d at 167, quoting 20 U.S.C. § 107(a). It assigned "priority . . . to blind persons licensed by a State agency" in the "operation of vending facilities on Federal property." *Id.*, § 107(b). The Secretary of Education ("Secretary") administers the Act and is charged to issue regulations "to assure that . . . (1) the priority under this subsection is given to such licensed blind persons . . . and (2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States." *Id.*

As originally enacted, § 107 simply "authorized" blind persons licensed by State agencies under the Act to operate vending stands on federal property. It was amended in 1954 to give blind persons licensed under the Act a new "preference" in such assignments, and to charge each department or agency in control of federal property to "prescribe regulations designed to assure such preference . . . without *unduly inconveniencing* such departments and agencies *or* adversely affecting the interests of the United States." Pub. L. No. 83-565, Ch. 655, 68 Stat. 663 (emphases added).

The 1974 amendments were enacted in response to extensive evidence that the blind vending stand program

"has not developed, and has not been sustained in the manner and spirit in which the Congress intended at the time of its enactment." Pub. L. No. 93-516, § 202, 88 Stat. 1623 (Congressional findings). Among other things, the legislative record shows that some federal agencies chronically resisted the requirements of the Act, often due to the competing interests of employee benefit organizations, and that they were able to evade those requirements because the Act lacked any effective enforcement mechanism. *See, e.g., Randolph-Sheppard Act for the Blind Amendments of 1973, Hearings Before the Subcommittee on the Handicapped of the U.S. Senate Committee on Labor and Public Welfare, 93d Cong., 1st. Sess., on S. 2581,* at 20, 23, 24-27, 31-32, 68-73, 303-04.

The 1974 amendments made other changes in § 107, whose earlier history is discussed above. These amendments divided § 107 into subsections, and in § 107(b) they (1) changed the "preference" to a "priority"; (2) centralized the duty to promulgate regulations in the Secretary; (3) deleted the exemption for cases that would "unduly inconvenienc[e]" host agencies; (4) ordered that "[a]ny limitation" on a vendor facility based on a host agency's finding that it would adversely affect the interests of the United States "*shall be fully justified in writing* to the Secretary, who *shall determine* whether such limitation is justified"; and (5) made such determinations "binding" on host agencies. (Emphasis added.)

The 1974 amendments also added several new sections, including 20 U.S.C. §§ 107d-1 and 107d-2, the sections most directly at issue here. Those sections create two new, largely parallel enforcement mechanisms, governed by §§ 107d-1(a) and (b) and procedurally by § 107d-2. Subsection (a) of § 107d-1 allows any blind licensee to submit disputes with a State licensing agency for an evidentiary hearing before that agency; and if the licensee is dissatisfied with its action "he may file a complaint with the Secretary who shall convene a panel to arbitrate the dis-

pute pursuant to section 107d-2 . . ., and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." Subsection (b) of § 107d-1 similarly provides that a State licensing agency which determines that a federal host agency is failing to comply with the Act or its regulations "may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2"; and again, "the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

Section 107d-2 governs procedure in arbitrations under § 107d-1, including (a) notice and hearing, (b) composition of the panel and "termination of violations," (c) publication of panel decisions in the Federal Register, and (d) payment of costs by the Secretary. Section 107d-2(a) provides that an RSA arbitration panel decision "shall be subject to appeal and review as a final agency action" under the Administrative Procedure Act (APA).

There is one significant distintion, however, between arbitrations requested by blind licensees, under § 107d-1(a), and arbitrations requested by State licensing agencies, under § 107d-1(b): Section 107d-2(b) provides for "termination of violations" (subsection caption) in cases under § 107d-1(b) but *not* in cases under § 107d-1(a).[2] The distinction most likely reflects the different origins of such cases. Section 107d-1(b) provides for arbitration when "any State licensing agency determines that any department, agency, or instrumentality of the United States . . . is *failing to comply with the provisions of this Act or any regulations issued thereunder*" (emphasis added). Section 107d-1(a), on the other hand, authorizes

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[2] Specifically, § 107d-2(b)(2) provides that if the arbitration panel finds the federal agency in violation of the Act or its regulations, the head of the agency "shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." There is no corresponding provision applicable to arbitrations under § 107d-1(a).

arbitration when a blind licensee is "dissatisfied with any action arising from the operation or administration of the vending facility program." In other words, Congress enacted § 107d-1(b) to create a remedy for federal agency recalcitrance—an issue that does not arise with State licensing agencies.

The Fourth Circuit opinion cites broadly and quotes at length from *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482, 1487-95 (11th Cir. 1990) ("*Nash*"), a case under § 107d-1(a) (and not § 107d-1(b), at issue here), and especially *dicta* in *Nash*;[3] but its reading of the statute focuses narrowly on the portion of subsection (b)(2) of § 107d-2 which states that if an RSA arbitration panel finds a federal host agency in violation of the Act or its regulations, the head of that agency "shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." *Id.*, quoted in opinion below, 98 F.3d at 169. Based on that provision and on *Nash*, the Fourth Circuit held that RSA arbitration panels have no remedial powers at all: "a § 107d-

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[3] The question in *Nash* was whether a blind vendor may recover compensatory damages under 20 U.S.C. § 107d-1(a), against a State licensing agency, for that agency's failure to take action against a federal entity. *See Nash*, 915 F.2d at 1484; opinion below, 98 F.3d at 170. This case, unlike *Nash*, arose under 20 U.S.C. § 107d-1(b) and not § 107d-1(a); it involves a State licensing agency's remedies against a federal agency and not a vendor's possible remedies against a State licensing agency; and it does not involve any claim for damages.

The *Nash* decision includes an "extensiv[e]" discussion of the possible remedial powers of a § 107d-1(b) panel and other issues not presented in that case. Opinion below, 98 F.3d at 170, citing *Nash*, 915 F.2d at 1487-95. Judge Clark's dissent in *Nash* criticized that discussion as both erroneous and unecessary. *See Nash*, 915 F.2d at 1501. We agree. We need not now address the merits of the Eleventh Circuit's decision under § 107d-1(a); but the procedural and factual distinctions between the two cases, discussed above, and the remedial distinction between § 107d-1(a) and § 107d-1(b), discussed in the text, warrant a highly skeptical approach to the *Nash* court's *dicta* regarding the latter.

1(b) arbitration panel will determine whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation." *Id.*

Under the Fourth Circuit's interpretation, "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel," *id.* at 170, and a State agency's only remedy is to "file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act," *id.* at 171. A third RSA arbitration panel presumably could be convened to review the agency's response to the second decision; and so, on and on, potentially *ad infinitum*. *Cf. Minnesota Dept. of Jobs and Training v. Riley*, 107 F.3d 648, 650 (8th Cir. 1997) ("*Riley II*") (after nine years of resisting the requirements of the Act, "[i]t is time for the [Veterans Canteen Service]'s scorched-earth campaign to end"). In short, in the Fourth Circuit, host agencies that violate the Act are "vested with the responsibility to end the acts found in violation," 98 F.3d at 170; and State licensing agencies' only remedy for host agency recalcitrance is a potentially endless cycle of non-final arbitration proceedings.

II. THE FOURTH CIRCUIT'S DECISION IGNORES MUCH OF THE LANGUAGE OF THE ACT AND IS CONTRARY TO CONGRESS' INTENT

As discussed above, the Fourth Circuit opinion focuses broadly on *Nash* and narrowly on the charge given by § 107d-2(b)(2) to heads of federal agencies that have violated the Act—to "cause such acts or practices to be terminated promptly and [to] take such other action as may be necessary to carry out the decision of the panel." It concludes that RSA arbitration panels can decide *only* "whether a federal entity's acts 'are in violation' of the Act"; they cannot "order the federal entity to take any remedial action." 98 F.3d at 170, quoting *Nash*, 915 F.2d at 1492.

The Fourth Circuit's interpretation is not merely "cumbersome," 98 F.3d at 171. It is wrong. It construes ambiguous statutory language as plain, in a way that is contrary to Congress' intent as manifested by the Act's purposes, functions and history, and that ignores the meaning of other provisions of the same Act. Subsection (b)(2) of § 107d-2 is not written in "plain language," as stated in the Fourth Circuit opinion. It is capable of two different readings, and the Fourth Circuit overlooked the reading that best effectuates the purposes of the statute and the plain meaning of the statute, and which best functions together with its remaining parts.

Section 107d-2(b)(2) requires the heads of federal agencies to "cause such [violations] to be terminated promptly" and to take "other action . . . to carry out" RSA arbitration panel decisions. Agency heads naturally have that responsibility; but that does not detract from the remedial authority of the RSA arbitration panels. Congress quite naturally did not create a "Randolph-Sheppard Police Force" with authority to move into federal agencies' executive suits and direct agency personnel in carrying out RSA arbitration panel decisions; it gave that responsibility to the officers in charge of the agencies. The language charging federal agency heads to "cause" violations "to be terminated promptly" means nothing other than that. The requirement that federal agencies "take such *other action* as may be necessary to *carry out the decision of the panel*" (emphases added), however, goes further; if an arbitration panel may do nothing more than determine that a federal agency is violating the Act, as the Fourth Circuit has held, then there is nothing *to* "carry out" (*i.e.*, to implement, or to execute)[4] and that provision is meaningless.

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[4] The *New Lexicon Webster's Dictionary* (New York 1988) defines "carry out" as "to fulfill, put (orders, etc.) into effect." *Webster's New World Dictionary of the American Language* (New York 1966) defines "carry out" as "1) to put (plans, instructions, etc.) into practice. 2) to get done; bring to completion; accom-

At a *minimum*, the reading presented above is a plausible interpretation of the statutory language that contradicts the "plain meaning" interpretation in the Fourth Circuit opinion—*i.e.*, it demonstrates that the statute is ambiguous. It therefore is proper to turn to other traditional tools of statutory construction, such as the Act's purposes, history, structure, and the working of the statute as a whole.

The Fourth Circuit's focus on the seemingly "plain" language of § 107d-2(b)(2) obscured its view of the remainder of §§ 107d-1 and 107d-2, which provide for appointment of panels to "arbitrate" disputes and authorize those panels to issue "decision[s]" that are "final and binding" and "subject to appeal and review as a final agency action" under the APA. Congress did not intend for the words "arbitrate" or "decision" or "final and binding" to mean something unique in this Act—a "decision" limited to findings of violation, made by an "arbitrat[ion]" panel without power to remedy the violation. It referred to a decision that left nothing to be done but for the agency head to implement the remedy ordered by that decision. Likewise, when Congress provided for judicial review of RSA panel decisions as "final agency action[s]" under the APA, it had in mind the traditional concept of finality that applies in that context. *See infra* at 12-13.

As noted in the Fourth Circuit's opinion, the Act is a labor and employment statute, enacted "to 'provid[e] blind persons with remunerative employment,'" enlarge their economic opportunities, and assist them in becoming more self-supporting. 98 F.3d at 167. In fact, the structure of the Act, and particularly the Secretary's regulations, share a number of characteristics in common with

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plish." Merriam-Webster's WWWebster Dictionary (Internet URL http://www.m-w.com/netdict.htm) similarly defines "carry out" as "1: to put into execution <carry out a plan> [;] 2: to bring to a successful issue: COMPLETE, ACCOMPLISH <you will be paid when you have carried out the assignment> . . . ."

federal labor law.[5] It therefore is not surprising that when Congress decided in 1974 that the Act required new tools for enforcement, it turned to the arbitration mechanism that had proved so successful in resolving disputes in conventional labor-industrial relationships.

A lengthy discussion of federal labor arbitration law is not needed. This Court knows well that in *any* form of "arbitration" known to Congress in 1974, arbitration panels had authority to order remedies for violations of the governing standard (for example, a collective bargaining agreement), and that with rare exceptions, their decisions were final.[6] There is no basis for an assumption that Congress intended a different meaning in the Randolph-Shepard Act. *See Delaware Dept. of Health and Social Services v. U.S. Dept. of Education*, 772 F.2d 1123, 1130 (3rd Cir. 1985): "Except for the unique

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[5] The Act and regulations authorize State licensing agencies to set aside funds from vending facility proceeds for "[t]he establishment . . . of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time . . ." 34 C.F.R. § 395.9(5); *see* 20 U.S.C. § 107b(3)(E). State licensing agencies must provide vocational and other training services to blind vendors, including on-the-job training in all aspects of vending facility operation. 34 C.F.R. § 395.11. In effect, a blind vendor operates a small business in partnership with a State licensing agency. *See generally* 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7.

[6] *See generally, e.g., United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *La Vale Plaza v. Noonan*, 378 F.2d 569, 572 (3rd Cir. 1967) ("[t]he general principle in a common law arbitration is that the arbitrators are the final judges of both the facts and the law and their decision will not be disturbed for a mistake of fact or of law"); *Gramling v. Food, Machinery & Chemical Corp.*, 151 F. Supp. 853, 857 (W.D. S.C. 1957) (reciting the "'settled rule that courts will not review the findings of law and fact contained in an award, and will never undertake to substitute their judgment for that of the arbitrators.' Any other rule would make an award the commencement, not the end, of litigation").

judicial review provision, there is no indication . . . that Congress used the term arbitration in any manner different from its conventional usage in other contexts."

The Fourth Circuit opinion, however, assumes implicitly that the Act uses the word "arbitrate" to mean something different from what it ever has meant before. Ample case law demonstrates that a court should not indulge in such an assumption unless compelled to do so. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *FDIC v. Meyer*, 510 U.S. 471, ——, 114 S. Ct. 996, 1001 (1994) ("In the absence of . . . a definition [in the statute], we construe a statutory term in accordance with its ordinary or natural meaning").

The Fourth Circuit's decision also is contrary to the portion of 20 U.S.C. § 107d-2(a) which provides that an RSA arbitration panel "decision . . . shall be subject to appeal and review as a final agency action" under the APA. Under the Fourth Circuit's opinion, an RSA arbitration panel's decision is not final, not enforceable, and not reviewable, under the APA or otherwise. It is merely a finding of a violation and a prelude to a new round of equally-inconclusive arbitration. Finality, enforceability, and reviewability all are left to the violator to resolve. A State agency (or its licensee) is not "aggrieved" by an RSA panel "decision" that finds a violation, and therefore it cannot obtain review of that decision (5 U.S.C. § 702). It will be aggrieved in some cases by host agencies' failures to comply with the Act *despite* an RSA arbitration's panel findings; but the only review of those failures is not under the APA, but to "have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act." 98 F.3d at 171.

At least in some cases, the result of the Fourth Circuit's holding will be an endless series of advisory decisions. State licensing agencies will have no means to enforce the Act against federal agencies. Congress acted to create a mechanism for "prompt and satisfactory disposition of blind licensee and state agency complaints" (S. Rep. No. 93-937 at 20, *reprinted in* 1974 U.S.C.C.A.N. 6373); the Fourth Circuit has taken it away.

The Fourth Circuit opinion concedes that "it may have been wiser for Congress to have provided for an automatic review of the remedial steps taken by a federal entity," but it concludes that leaving States without such a review is not " 'so gross as to shock the general moral or common sense.' " 98 F.3d at 170-71, *quoting Crooks v. Harrelson,* 282 U.S. 55, 60 (1930). In our view, the fact that State licensing agencies are left without an effective means of seeking judicial enforcement of the decisions of RSA arbitration panels does "shock the general moral or common sense"; *and* it is contrary to the express will of Congress.

The Fourth Circuit's decision flies in the face of its recognition that "Congress enacted the Act to 'provid[e] blind persons with remunerative employment, enlarge[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting' " (98 F.3d at 167, quoting 20 U.S.C. § 107(a)), because it creates a broad avenue for recalcitrant federal agencies to frustrate (or at best to delay severely) the efforts of State licensing agencies to provide such employment. Its decision is even more clearly contrary to its acknowledgment "that Congress enacted the remedial provisions of the Act to 'provide the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes.' " 98 F.3d at 171, quoting 1974 legislative history. According to the Fourth Circuit, the wrongdoer is left to police his own wrong; neither a blind licensee nor a State

licensing agency may enforce the Act against an obstinate federal agency. Their only recourse is to engage in endless, unenforceable "arbitrations"—prevailing in theory, aggrieved in fact but not in law, without a final order, unable to obtain judicial enforcement or review.

As the Eleventh Circuit panel's majority stated in *Nash*, this construction leaves State agencies and blind vendors "no substantive right" and "no substantive remedy"—only a "procedural right to complain" that is almost "empty." 915 F.2d at 1488. That is entirely inconsistent with the intent of Congress, as expressed in both the legislative history (*see, e.g., Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 101-03 (D.C. Cir. 1986); National Federation of the Blind's Petition for Certiorari at 23) and the language of the Act.

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN INTER-CIRCUIT CONFLICT

In *Riley II*, 107 F.3d 648, the Eighth Circuit affirmed a district court order "which granted Minnesota's motion to enforce [an RSA arbitration] Panel's decision" that the Veterans Canteen Service (VCS) is subject to the Randolph-Sheppard Act and does not have the right to install and operate vending machines to compete with a Randolph-Sheppard Act licensee. *Id.* at 649. The Eighth Circuit took the position that its decision was not in conflict with the decision in this case (or with the Eleventh Circuit's decision in *Nash*, 915 F.2d 1482), because the arbitration panel "never ordered the VCS to take any remedial action, but simply decided competing VCS vending machines at the VA Medical Center would violate the Act." *Riley II*, 107 F.3d at 650.

We respectfully disagree. The district court in *Riley* entered an "enforcement order," *id.* at 649, which it characterized as a preliminary injunction; but the Eighth Circuit "agree[d] with the VCS that, for the purpose

of review, [it] should treat the order as a permanent injunction." *Id.* It appears quite clear that under *Riley II*, if a federal agency refuses to implement an RSA arbitration panel's award, a State licensing agency may obtain an injunction in a federal district court enforcing the award. But in the Fourth Circuit, under the decision below, there is no "automatic review of the remedial steps taken by a federal entity in response to an arbitration decision"—a State licensing agency's only remedy is to "file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act." Opinion below, 98 F.3d at 171.

The conflict seems clear, and it is not likely to go away by itself. Decisions under § 107d-1(a) (such as *Nash*, 915 F.2d 1482 (11th Cir. 1990), *Delaware Dept. of Health and Social Services v. U.S. Dept. of Education*, 772 F.2d 1123 (3rd Cir. 1985), and *Hudson v. Boxer*, 632 F. Supp. 1569 (D. Colo. 1986)) are not directly pertinent to the issues presented by this case, but they also reflect a deep confusion among the lower courts as to the proper interpration and application of the arbitration provisions of the Act. The current status of the law is that (1) in the Third Circuit (*see Delaware Dept. of Health*), a blind licensee may recover compensatory damages and attorneys' fees in an arbitration against a State licensing agency under § 107d-1(a); (2) in the Eleventh Circuit (*see Nash*)—and probably in the Fourth Circuit, in view of its reliance on *Nash* in the decision below—an RSA arbitration panel may not grant *any* form of relief in an arbitration under the same statute; (3) in the Fourth Circuit (*see* decision below), a § 107d-1(b) arbitration panel has no remedial authority and a district court may not enforce its decision; and (4) in the Eighth Circuit (*see Riley II*), the remedial authority of a § 107d-1(b) arbitration panel is not clear, but it *is* clear that a district court

may enter an injunction enforcing a panel's decision; and (5) at least in Colorado (*see Hudson*), blind vendors may obtain a preliminary injunction against State officials to maintain the status quo pending arbitration. Other filings in this case document the fact that other lower courts have faced similar issues as well, with similarly inconsistent results.

Finally, the issue is of critical importance to the effective functioning of the Randolph-Sheppard Act and of State licensing agencies established under that Act. As noted at the outset, if the Fourth Circuit's decision is the law, the ability of State licensing agencies to accomplish their missions will be hampered severely—because a federal agency that is disinclined to comply with the Act or with an arbitration award will be able to postpone its compliance indefinitely, and because the costs to State licensing agencies of seeking such compliance will be multiplied several times over. The ultimate losers, of course, will not be the State licensing agencies or the taxpayers who support them. The greatest losers will be the blind citizens of our Nation, who will be denied the opportunities that Congress gave them when it enacted and amended the Act—the opportunities to achieve remunerative employment, to support themselves, and to increase their actual and personal sense of dignity and value to themselves and their communities.

CONCLUSION

The Commonwealth of Virginia and the States of Colorado, Illinois, Mississippi, and Rhode Island respectfully submit that the Court should grant the petitions for certiorari and reverse the judgment below.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

NATIONAL FEDERATION OF THE BLIND, ET AL., PETITIONERS

v.

DEPARTMENT OF VETERAN AFFAIRS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an arbitration panel convened under the Randolph-Sheppard Act, 20 U.S.C. 107d-1(b), 107d-2(b)(2), to resolve a dispute between a state licensing agency and a federal entity, may go beyond determining whether a statutory violation occurred and order a federal entity found to be in violation of the Act to take specific remedial action.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Brown v. *Gardner*, 513 U.S. 115 (1994)	15
Delaware Dep't of Health v. *United States Dep't of Educ.*, 772 F.2d 1123 (3d Cir. 1985)	12
Fillinger v. *Cleveland Soc. for the Blind*, 587 F.2d 336, reh'g denied, 591 F.2d 378 (6th Cir. 1979)	12
Franklin v. *Gwinnett County Public Schs.*, 503 U.S. 60 (1992)	9, 10
Georgia Dep't of Human Resources v. *Nash*, 915 F.2d 1482 (11th Cir. 1990)	7, 8, 13, 14
Lane v. *Pena*, 116 S. Ct. 2092 (1996)	10
Massachusetts Elected Comm. of Blind Vendors v. *Matava*, 482 F. Supp. 1186 (D. Mass. 1980)	12
McNabb v. *United States Dep't of Educ.*, 862 F.2d 681 (8th Cir. 1988), cert. denied, 493 U.S. 811 (1989)	12
Minnesota Dep't of Economic Security v. *Riley*, 107 F.3d 648 (8th Cir. 1997)	11, 12
Minnesota, Dep't of Jobs & Training v. *Riley*, 18 F.3d 606 (8th Cir. 1994)	6, 13, 14
New York v. *USPS*, 690 F. Supp. 1346 (S.D. N.Y. 1989)	12
Randolph-Sheppard Vendors of America v. *Weinberger*, 795 F.2d 90 (D.C. Cir. 1986)	9, 10-11, 12
Russello v. *United States*, 464 U.S. 16 (1983)	14
Tennessee Dep't of Human Servs. v. *United States Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992)	12

Cases—Continued: Page

United States v. *Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344 (S.D. Miss. 1992) 7, 14

Statutes and regulation:

Administration Procedure Act, 5 U.S.C. 551 *et seq.* 4
Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*:
20 U.S.C. 107-107f 2
20 U.S.C. 107(b) 2, 3
20 U.S.C. 107(b)(2) 2
20 U.S.C. 107a(a) 2
20 U.S.C. 107a(a)(1) 3
20 U.S.C. 107a(a)(5) 3
20 U.S.C. 107a(c) 3
20 U.S.C. 107a(d)(1) 2, 5
20 U.S.C. 107b 3
20 U.S.C. 107b(3)(D) 3
20 U.S.C. 107d-1(a) 4, 8
20 U.S.C. 107d-1(b) 3, 5, 8
20 U.S.C. 107d-2(a) 3, 4
20 U.S.C. 107d-2(b) 9
20 U.S.C. 107d-2(b)(1) 4, 5, 8, 12, 13, 14
20 U.S.C. 107d-2(b)(2) 3, 4, 5, 7, 8, 9, 10, 12, 13, 14
20 U.S.C. 107d-3 3
Veteran's Canteen Service Act, 38 U.S.C. 7801 *et seq.* 6
38 U.S.C. 7801 6
38 U.S.C. 7802(1) 6
34 C.F.R. 395.16 3

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a)[1] is reported at 98 F.3d 165. The opinion and order of the district court (Pet. App. 17a-31a) are reported at 896 F. Supp. 513. The arbitration panel's final

[1] References to "Pet. App." are to the appendix to the petition in No. 96-1550.

award (Pet. App. 40a-45a) and its earlier opinion and award (Pet. App. 32a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1996. Petitions for rehearing were denied on December 31, 1996. Pet. App. 15a-16a. The petition for a writ of certiorari in No. 96-1551 was filed on March 28, 1997. The petition for a writ of certiorari in No. 96-1550 was filed on March 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises under the Randolph-Sheppard Act, 20 U.S.C. 107-107f, a cooperative federal/state program for licensing, training and placing qualified blind persons as operators of vending facilities on federal property. The Act provides that, "[i]n authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency." 20 U.S.C. 107(b). Under the Act, the design for every newly constructed federal government building must include a satisfactory site for a Randolph-Sheppard Act vending facility. 20 U.S.C. 107a(d)(1). The Act charges the Secretary of Education with responsibility for interpreting and enforcing its provisions, including prescribing regulations to ensure that, "wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility * * * would not adversely affect the interests of the United States." 20 U.S.C. 107(b)(2); see 20 U.S.C. 107a(a). "Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would

adversely affect the interests of the United States shall be fully justified in writing to the Secretary [of Education], who shall determine whether such limitation is justified." 20 U.S.C. 107(b).

The Act is implemented in the various States by state agencies that are selected by the Secretary to act as licensing agencies. 20 U.S.C. 107a(a)(1), 107b. State licensing agencies are authorized to, *inter alia*, issue licenses and select the location and type of vending facility at a federal property, with the approval of the head of the federal entity controlling the property. 20 U.S.C. 107a(a)(5), 107a(c). A state licensing agency applies to the appropriate federal entity for a permit to establish a site for a licensed blind vendor on federal property. 20 U.S.C. 107a(c); 34 C.F.R. 395.16. Selected vendors earn income from the profits of the vending facilities they operate and from a fund established under the statutory scheme. 20 U.S.C. 107a(a)(1), 107b(3)(D), 107d-3.

The Act further provides that, if a state licensing agency determines that a federal entity that controls federal property is failing to comply with the provisions of the Act or regulations issued thereunder, the state licensing agency may file a complaint with the Secretary of Education. 20 U.S.C. 107d-1(b). Upon receipt of such a complaint, "the Secretary shall convene an ad hoc arbitration panel" to arbitrate that dispute. 20 U.S.C. 107d-1(b), 107d-2(a). The arbitration panel consists of three members, including one person designated by the state licensing agency, one person designated by the head of the federal entity controlling the federal property over which the dispute arose, and one person jointly designated by the first two members. 20 U.S.C. 107d-2(b)(2). If a party fails to designate a panel member, the Secre-

tary of Education designates a member on the party's behalf. 20 U.S.C. 107d-2(b)(2). The panel must, in accordance with certain provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, "give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action" for purposes of the APA. 20 U.S.C. 107d-2(a). If the panel finds that "the acts or practices" of the federal entity are in violation of the Act or regulations issued thereunder,

> the head of any such * * * agency * * * shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

20 U.S.C. 107d-2(b)(2).[2]

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[2] Under the statutory scheme, federal agencies do not have a direct relationship with the blind licensees. If a blind licensee is "dissatisfied with any action arising from the operation or administration of the vending facility program," the licensee may obtain a full evidentiary hearing before the state licensing agency. 20 U.S.C. 107d-1(a). If the licensee is dissatisfied with "any action taken or decision rendered as a result of such hearing," the licensee may file a complaint with the Secretary, who must convene a panel under Sections 107d-1(a) and 107d-2(b)(1), to arbitrate the dispute. That panel consists of three persons, one designated by the state licensing agency, one designated by the blind licensee, and one designated by the first two members. 20 U.S.C. 107d-2(b)(1). As under Section 107d-2(b)(2), the Secretary designates a member if a party fails to do so. *Ibid.* Like an arbitration panel designated under Section 107d-2(b)(2) to resolve a dispute between a federal entity and a state licensing agency, the arbitration panel must, in accordance with certain provisions of the APA, "give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action" for purposes of the APA. 20 U.S.C. 107d-2(a). Unlike the procedure under Section

2. Petitioner in No. 96-1550, the Maryland State Department of Education, Division of Rehabilitation Services, is designated as the state licensing agency under the Randolph-Sheppard Act in the State of Maryland. Petitioners in No. 96-1551 are the National Federation of the Blind and Donald J. Morris, a blind individual residing in the State of Maryland.[3]

In 1987, respondent, the Department of Veterans Affairs,[4] began construction of the Veteran Affairs Medical Center in Baltimore, Maryland. Petitioner was not afforded notice of the construction as required under the Act, 20 U.S.C. 107a(d)(1), but it learned of the project and applied to respondent for a permit in December 1991 to operate a Randolph-Sheppard Act vending facility at the new VA center. Pet. App. 5a, 18a. Respondent denied the request, and petitioner filed a complaint with the Secretary of Education for arbitration pursuant to Sections 107d-1(b) and 107d-2(b)(2). *Id.* at 5a.

After a hearing, the arbitration panel issued an order on May 5, 1994, rejecting respondent's conten-

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107d-2(b)(2), however, Section 107d-2(b)(1) is silent regarding any limitations on the panel's authority to remedy violations.

[3] The petitioners in No. 96-1551 were not parties in the district court proceedings, but the National Federation of the Blind filed a brief as *amicus curiae* supporting the Maryland State Department of Education, Division of Rehabilitation Services, in the court of appeals. Both petitioners in No. 96-1551 became intervenors in the court of appeals for purposes of filing a petition for rehearing with suggestion of rehearing en banc. Pet. App. 15a-16a. References to "petitioner" in the singular refer to the petitioner in No. 96-1550.

[4] Petitioner brought this action against the Department of Veterans Affairs and several officials of that Department, all of whom we refer to collectively as respondent.

tion that the Act should not apply to the new facility[5] and directing the parties to "enter into negotiations leading to a permit that will allow [petitioner] and its licensed blind vendor or vendors to operate the retail store" at the Baltimore site. Pet. App. 39a. The arbitration panel further ordered that, if the parties failed to agree on such a permit by a specified date, each party should submit a proposed permit and the permit preferred by the majority of the panel would become the panel's final award. *Ibid.* The panel ultimately issued a final order denying respondent's motion for reconsideration, adopting the only permit proposed (that of petitioner), and directing respondent to "turn over the operation of the retail store" at the Baltimore site to petitioner. *Id.* at 5a-6a, 39a-41a.

3. Petitioner brought the instant action in the United States District Court for the District of Maryland, seeking enforcement of the arbitration

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[5] Respondent initially took the position that the Randolph-Sheppard Act was inapplicable to its medical facilities because of the Veterans' Canteen Service Act (VCS Act), 38 U.S.C. 7801 *et seq.* The VCS is an independent unit within the Department of Veterans Affairs established "for the primary purpose of making available to [hospitalized] veterans * * * at reasonable prices, articles of merchandise and services essential to their comfort and well-being." 38 U.S.C. 7801. Respondent operates stores and canteens under the VCS Act in its hospitals where it deems it "necessary and practicable" to do so. Pet. App. 6a n.2; 38 U.S.C. 7802(1). The arbitration panel in this case concluded (with one panel member dissenting) that the then-recent decision in *Minnesota, Department of Jobs and Training* v. *Riley*, 18 F.3d 606 (8th Cir. 1994), controlled and required rejection of the argument that the Randolph-Sheppard Act does not apply to VA facilities. Pet. App. 34a-38a, 42a-45a. Respondent did not press that argument in the courts below. *Id.* at 21a.

panel's award. On cross-motions for summary judgment, the district court entered judgment for respondent. Pet. App. 17a-31a. The court held that the arbitration panel had exceeded its statutory authority by ordering respondent to take specific remedial action. *Id.* at 6a-7a, 26a-27a. The court reasoned that, "under the [Randolph-Sheppard Act] it is the role of the agency head, in this case the Secretary of Veterans Affairs, to remedy any violation of the Act." *Id.* at 26a (citing 20 U.S.C. 107d-2(b)(2)). The court expressed its agreement with the view of the Eleventh Circuit in *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482 (1990), that an arbitration panel convened under Section 107d-2(b)(2) "has no remedial powers whatsoever. It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself." Pet. App. 26a-27a (quoting *Nash*, 915 F.2d at 1492, and citing *United States* v. *Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344, 1352 (S.D. Miss. (1992)).[6]

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[6] At the suggestion of the district court, petitioner had added a plea for alternative relief, requesting that the court exercise its equity powers and order respondent to comply with the Act. Pet. App. 22a-25a, 27a. The court ultimately declined to grant such relief, however, concluding that the record as it stood did not show that respondent had violated the Act. *Id.* at 29a. The court also noted that it was not resolving various issues concerning respondent's order regarding alternative sites, which had been issued during the pendency of the court proceedings. See *id.* at 22a-25a, 27a-30a.

4. The court of appeals affirmed. Pet. App. 1a-14a. It ruled that "the plain language of § 107d-2(b)(2) limits the authority of an arbitration panel convened under § 107d-1(b) to a determination of whether the acts of the federal entity 'are in violation' of the substantive provisions of the Act." *Id.* at 9a. The court read Section 107d-2(b)(2) to provide "that a § 107d-1(b) arbitration panel will determine whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation." *Id.* at 9a-10a. Thus, the court concluded, "the statute places the responsibility for ending the violation on the head of the federal entity and does not authorize a § 107d-1(b) arbitration panel to order the federal entity to take specific remedial action." *Id.* at 9a-10a.

The court of appeals pointed to the Eleventh Circuit's discussion of "the differences between the remedial procedures provided under § 107d-1(a) for complaints filed by blind licensees against the state licensing agency and those provided under § 107d-1(b) for complaints filed by the state licensing agency against a federal entity." Pet. App. 10a (citing *Nash*, 915 F.2d at 1491-1492); see note 2, *supra* (describing process for arbitration panel convened under Sections 107d-1(a) and 107d-2(b)(1), rather than Sections 107d-1(b) and 107d-2(b)(2)). The court agreed with the *Nash* court's view that, unlike an arbitration panel convened under Section 107d-1(a), a panel convened under Section 107d-1(b) does not have authority to order a specific remedy, but rather is limited by the text of the Act to a determination of whether the federal entity's acts "are in violation" of the Act. Pet. App. 11a (quoting *Nash*, 915 F.2d at 1492).

The court below declined to rule that a Section 107d-1(b) arbitration panel has broader authority

based on the statement in *Randolph-Sheppard Vendors of America* v. *Weinberger*, 795 F.2d 90, 109 (D.C. Cir. 1986), that the Secretary of Education "has broad remedial powers under the Act." Pet. App. 11a. The court noted that that statement was not supported by any articulated rationale or any explanation of the effect of the language in Section 107d-2(b) that specifies that the head of the federal entity has the responsibility to remedy any statutory violations found by the arbitration panel. *Id.* at 11a-12a.

ARGUMENT

1. Petitioner contends (96-1550 Pet. 11) that the court of appeals' ruling constitutes a "complete disregard of the presumption applied in this Court's decisions approving remedies when findings have been made that federal law has been violated." Petitioner argues (*id.* at 11-16) that the court should have interpreted the Randolph-Sheppard Act to authorize arbitration panels convened under Section 107d-2(b)(2) to enter specific remedial orders, relying on a presumption in favor of all appropriate relief drawn from *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992), and the cases cited therein.[7]

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[7] See also 96-1551 Pet. 22, 27 (asserting that court of appeals' ruling is inconsistent with *Franklin*, thereby creating constitutional problems, and is in tension with federal labor law); Wisconsin Academy of Trial Lawyers et al. *Amici* Br. 18-20 (urging Court to grant review to fashion judicial remedy under *Franklin*). It does not appear that any constitutional claims were raised in the courts below. Petitioners apparently did not raise an argument under *Franklin* in the courts below, although it was discussed in an *amicus* brief on appeal and in the intervenors' rehearing petition. See Nat'l Federation of the Blind et al. C.A. *Amici* Br. 17-19; C.A. Pet. for Rehearing

The court of appeals correctly interpreted the Act as limiting the authority of an arbitration panel convened under Section 107d-2(b)(2) to the making of a determination whether "acts or practices" of a federal entity are in violation of the Act or regulations issued thereunder. If the arbitration panel finds that the federal entity's acts or practices are in violation of the Act or regulations, the plain language of the Act commands the head of the federal entity to rectify the violation—the federal entity head must "cause such acts or practices to be terminated promptly" and must "take such other action as may be necessary to carry out the decision of the panel." 20 U.S.C. 107d-2(b)(2). The court of appeals thus accurately ruled that "the statute places the responsibility for ending the violation on the head of the federal entity and does not authorize a § 107d-1(b) arbitration panel to order the federal entity to take specific remedial action." Pet. App. 10a.

The Court's ruling in *Franklin* does not suggest otherwise. As this Court recently explained, *Franklin* involved an action against non-federal defendants, and the presumption on which the Court relied in that case cannot trump federal statutory provisions that limit the remedial scheme that is available in a matter involving a federal agency. See *Lane* v. *Pena*, 116 S. Ct. 2092, 2098-2099 (1996); see also *Franklin*, 503 U.S. at 68 (presumption applies only where Congress has not expressed a contrary intent).

2. Petitioners assert (96-1550 Pet. 17-18; 96-1551 Pet. 11-16) that the court of appeals' decision conflicts with the decisions in *Randolph-Sheppard Vendors of*

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and Suggestion of Rehearing In Banc of Nat'l Federation of the Blind et al. 11, 15.

America v. *Weinberger*, 795 F.2d 90 (D.C. Cir. 1986), and *Minnesota Department of Economic Security* v. *Riley*, 107 F.3d 648 (8th Cir. 1997).

a. The court below did not, as petitioners suggest (96-1550 Pet. 17; 96-1551 Pet. 11-12), expressly disagree with the ruling of the D.C. Circuit in *Weinberger*. It simply declined to read into dicta in the *Weinberger* opinion an interpretation of the Act that is inconsistent with the plain statutory language.

The *Weinberger* court did not address the question presented by the instant case. It involved an action brought in federal district court directly against the head of a federal entity that controlled federal properties (military bases) to challenge two government contracts for the construction and operation of fast-food restaurants on those properties. 795 F.2d at 92. None of the plaintiffs had sought arbitration under the Act, and the D.C. Circuit ruled that the suit was barred because the plaintiffs had failed to exhaust the Act's administrative remedies, which the court concluded were mandatory. *Id.* at 93.

In the course of its discussion of the exhaustion issue (see 795 F.2d at 100-111), the *Weinberger* court considered whether various exceptions to the exhaustion doctrine should apply, including whether the plaintiffs would suffer irreparable injury absent immediate judicial review. The court concluded that no such injury would result based on a series of factors, including that there was no unusual delay in the administrative process, the administrative process might yield relief if a violation were found, and a stay could have preserved the plaintiffs' rights. *Id.* at 107-111. In its description of the possible relief available in the administrative process, the court stated that it "appears," that it "may well be," and

that it "might well be" that the Secretary could provide broad remedies against the federal entity if the panel found statutory or regulatory violations. *Id.* at 109. Due to the context in which the statements were made, the court did not provide a supporting rationale for that speculation. Because the court did not have before it an actual arbitration panel order that purported to grant specific remedial relief against a federal entity, the court did not actually rule on the scope of the remedies available from an arbitration panel against a federal entity. Such speculation about what type of relief might be available from an arbitration panel cannot carry great weight, and does not in any event give rise to a circuit conflict.[8]

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[8] The court of appeals' ruling also does not conflict with other cases cited by petitioners (96-1551 Pet. 10-11) that focused primarily on the debate about whether exhaustion of administrative remedies is mandatory under the Act. See, *e.g.*, *Fillinger* v. *Cleveland Society for the Blind*, 587 F.2d 336, reh'g denied, 591 F.2d 378 (6th Cir. 1978); *New York* v. *United States Postal Service*, 690 F. Supp. 1346, 1349 (S.D.N.Y. 1989); and *Massachusetts Elected Comm. of Blind Vendors* v. *Matava*, 482 F. Supp. 1186, 1189 (D. Mass. 1980). Those cases did not hold that an arbitration panel convened under Section 107d-2(b)(2) is authorized to order a federal entity to take specific remedial action.

Other cases cited by petitioners (96-1550 Pet. 18; 96-1551 Pet. 11, 15) are readily distinguishable as well because they involved arbitration panels convened under Section 107d-2(b)(1) (not under Section 107d-2(b)(2)), and addressed issues regarding the availability of damages against a State. See, *e.g.*, *Tennessee Dep't of Human Servs.* v. *United States Dep't of Educ.*, 979 F.2d 1162, 1165 (6th Cir. 1992); *McNabb* v. *United States Dep't of Educ.*, 862 F.2d 681, 684 (8th Cir. 1988) (Lay, C.J., concurring and dissenting), cert. denied, 493 U.S. 811 (1989); *Delaware Dep't of Health & Social Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1136 (3d Cir. 1985). The

b. The court of appeals' decision also does not conflict with the Eighth Circuit's recent decision in *Minnesota Department of Economic Security* v. *Riley*, 107 F.3d 648 (1997). The *Riley* court explicitly noted that its ruling does not raise the concerns addressed by the ruling in the instant case or in *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482 (11th Cir. 1990), because the arbitration panel in that case "never ordered the [federal entity] to take any remedial action, but simply decided" that certain action "would violate the Act." 107 F.3d at 650. The Eighth Circuit emphasized that the arbitration panel in that case "did exactly what the statute authorizes." *Ibid.* The *Riley* court's ruling that a federal entity cannot ignore its statutory responsibility to bring itself into compliance with the Act is not inconsistent with the ruling below.[9] The ruling below does not suggest that a federal entity

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statutory text makes clear that the authority of an arbitration panel under Section 107d-2(b)(1) is different in relevant respects from that of an arbitration panel under Section 107d-2(b)(2), so that those cases do not conflict wit the ruling below. See note 2, *supra*; see also State of Colorado et al. *Amici* Br. 15-16 (conceding that such cases are not directly on point but suggesting that they add confusion to the issue).

[9] The attempt by petitioners (see 96-1551 Pet. 11, 13-14) to create a conflict between the ruling below and an earlier Eighth Circuit decision fails for the same reason. The court there did not address the issue presented here. It affirmed the district court's ruling that had set aside an arbitration panel order allowing the parties to negotiate an agreement outside the Act's permit requirements. *Minnesota, Dep't of Jobs and Training* v. *Riley*, 18 F.3d 606, 608 (1994). In doing so, the court merely affirmed the principle that it later emphasized in its other *Riley* opinion—that federal entities subject to the Act must abide by the Act's requirements. *Ibid.*

can evade its obligations under the Act. Moreover, the district court suggested that, if a federal entity advances a remedy that is plainly inadequate, the state licensing agency would not be precluded from challenging that remedy through an independent APA action, although it declined to engage in such review based on the circumstances of this case. See note 6, *supra*.[10]

c. The ruling below is consistent with the analysis of the other federal courts that have discussed the question. See *Nash*, 915 F.2d at 1487-1495; *United States* v. *Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344 (S.D. Miss. 1992). Those courts have similarly opined that an arbitration panel convened under Section 107d-2(b)(2) to resolve a dispute between a state licensing agency and a federal entity has no remedial authority. As the *Nash* court recognized, Congress's inclusion of language in Section 107d-2(b)(2) limiting the panel's authority to resolution of whether a federal entity has violated the Act and imposing on the federal entity the obligation to end the violation, while omitting such language from Section 107d-2(b)(1), establishes that Congress acted intentionally when it limited the remedial authority of Section 107d-2(b)(2) arbitration panels. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in

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[10] The district court indicated that it would have jurisdiction to review final agency action of respondent, but declined to do so because petitioner had not made an adequate factual showing. Thus, there is no merit to petitioners' argument (96-1551 Pet. 20-22) that the decision below creates a constitutional due process problem. See also note 7, *supra* (constitutional claims not raised below).

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); see also *Brown* v. *Gardner*, 513 U.S. 115, 120 (1994).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION,
DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

THE NATIONAL FEDERATION OF THE BLIND
and DONALD J. MORRIS,
Petitioners,

v.

DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS NFB AND MORRIS

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14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE RESPONDENTS HAVE MISREAD AND MISAPPLIED THIS COURT'S DECISIONS IN *FRANKLIN* AND *PENA*	2
A. The *Pena* decision, relied on by Respondents, actually Supports the position of the Petitioners	3
B. The Respondents misconstrue the concept of "Remedy," as that term is used by this Court in *Franklin*	4
II. THE BRIEF FOR THE FEDERAL RESPONDENTS SHOWS THEIR CONFUSION, AND IGNORES CONFLICTS, IN THE FEDERAL COURTS' INTERPRETATION OF THE RANDOLPH-SHEPPARD ACT	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Abbott Laboratories, et al. v. Gardner, 387 U.S. 136 (1967)	5
Armco Employees Independent Federation, Inc. v. Armco Steel Co., 65 F.3d 492 (6th Cir. 1995)	5
Bell v. Hood, 327 U.S. 678 (1946)	2
Commissioner v. Bilder, 369 U.S. 499 (1962)	6
Delaware Department of Health and Social Services v. United States Department of Education, 772 F.2d 1123 (3d Cir. 1985)	2, 7, 8
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)	2, 3, 4
Georgia Department of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990)	7
Howe v. Bolger, 35 CCH EPD 34,822 (E.D. Wis. 1984)	8
Hudson v. Boxer, 632 F. Supp. 1569 (D. Colo. 1986)	8
Lane v. Pena, 116 S. Ct. 2092 (1996)	3, 4
Maryland State Department of Education v. United States Department of Veterans Affairs, 896 F. Supp. 513 (D. Md. 1995)	3
Maryland State Department of Education v. United States Department of Veterans Affairs, 98 F.3d 165 (4th Cir. 1996)	3, 6
Minnesota Department of Economic Security v. Riley ("Riley II"), 107 F.3d 648 (8th Cir. 1997)	7, 8
Minnesota Mining Co. v. New Jersey Wood Co., 381 U.S. 311 (1965)	6
New York v. United States, 326 U.S. 572 (1946)	2
Oregon Dept. of Fish and Wildlife v. Klamath Tribe, 473 U.S. 753 (1985)	9
Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986)	6
Rothensies v. Electric Battery Co., 329 U.S. 296 (1946)	7
Saxbe v. Washington Post Co., 417 U.S. 843 (1974)	9
Shapiro v. United States, 335 U.S. 1 (1948)	6

TABLE OF AUTHORITIES—Continued

	Page
Texas State Commission for the Blind v. United States, 796 F.2d 400 (Fed. Cir. 1986)	5
United States v. Ruzicka, 329 U.S. 287 (1946)	7
United States v. National Bank of Commerce, 472 U.S. 713 (1985)	9
United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960)	5
Statutes and Rules	
20 U.S.C. § 107(b)	2
20 U.S.C. § 107d-1	4
20 U.S.C. § 107d-1(a)	8
20 U.S.C. § 107d-1(b)	8
20 U.S.C. § 107d-2	6
20 U.S.C. § 107d-2(a)	5
20 U.S.C. § 107d-2(b)	7
20 U.S.C. § 107d-2(b)(1)	8
20 U.S.C. § 107d-2(b)(2)	8
Administrative Procedure Act	5
United States Supreme Court Rule 15.6 (1997)	1, 5
Miscellaneous	
Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* (BNA 7th Ed. 1993)	9

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REPLY BRIEF FOR PETITIONERS NFB AND MORRIS

Pursuant to this Court's Rule 15.6, the National Federation of the Blind and Donald J. Morris (collectively, "NFB"), Petitioners, make this Reply to the new points raised in the Federal Responents' Brief in Opposiiton to their Petiiton for a Writ of Certiorari.

Respondents argue that there is no conflict between the Circuits as to the issue in the case at bar. Eighteen States and the national association that represents State agencies for the blind have filed *amici* briefs, however, arguing that

the decision of the Court below deepens an existing conflict among the Circuits and causes serious confusion regarding the Randolph-Sheppard Act ("RSA") throughout the Country. This Court has deemed the involvement of a State as a Petitioner for a Writ of Certiorari to be an important factor in deciding to grant or deny Certiorari (*New York v. United States*, 326 U.S. 572, 574 (1946)), and thus, *a fortiori*, the strongly expressed concerns of so many States should be given substantial weight by the Court in the case at bar.

I. THE RESPONDENTS HAVE MISREAD AND MISAPPLIED THIS COURT'S DECISIONS IN *FRANKLIN* AND *PENA*

Within the meaning of this Court's Rule 15.6, Respondents raise a new point when they argue that *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), is inapposite because the Respondents represent a federal agency.[1] Respondents' Brief, p. 10. Respondents misunderstand *Franklin*. The seminal case of *Bell v. Hood*, 327 U.S. 678 (1946), upon which *Franklin* is directly premised, involved an action against a federal agency (*Id.*, 327 U.S. 679-80, 684), and, as the *Franklin*

[1] The Respondents do not argue, nor could they, that the Act has been unfairly applied to them. The Respondents acknowledge that the Act is "a cooperative federal/state program for licensing, training and placing qualified blind persons as operators of vending facilities on federal property." Respondents Brief, p. 2. The Respondents have acknowledged without objection that the Act applies to them. Respondent's Brief, p. 6, n.5. The States voluntarily undertake to insure the working conditions of blind vendors on federal property and must apply to the United States Secretary of Education for permission to license blind vendors to work on that federal property. *Delaware Department of Health and Social Services v. United States Department of Education*, 772 F.2d 1123, 1130-32 (3d Cir. 1985). As pointed out by the National Council of State Agencies for the Blind in its Amici Brief, at pp. 13-20, the Act is not enforced against the Respondents by the States, but by the Secretary of Education pursuant to his authority under 20 U.S.C. § 107(b) and by and through the arbitration panels convened by the Secretary of Education under the Act.

Court noted, the ancient doctrine that there can be no right without a remedy has from time immemorial been applied to Acts of Congress designed to vest citizens with rights against federal agencies ("[t]he Court applied these principles to an Act of Congress that accorded a right of action in mail carriers to sue for adjustment and settlement of certain claims for extra services but which did not specify the precise remedy available to the carriers," *Id.*, 503 U.S. at 66).

A. The *Pena* decision, relied on by Respondents, actually supports the position of the Petitioners

Lane v. Pena, 116 S. Ct. 2092 (1996), the only decision relied on by the Respondents to "distinguish" *Franklin*, in fact supports the position of the Petitioners that an RSA panel arbitration award ought to be enforceable in federal court. The case at bar would not exist if the Courts below had enforced the award of the RSA panel below by granting injunctive relief in favor of the State licensing agency ("SLA") requiring the Respondents to surrender space for a blind vendor stand. That was the only relief sought by the SLA below. 896 F. Supp. 514. The award made by the RSA panel below was clearly injunctive in nature,[2] and only injunctive relief is at issue in the case at bar. *Pena* involved an attempt to impose a damage remedy on a federal agency, but did not in any sense foreclose injunctive relief against that agency.[3] As this Court made clear in *Pena*, "The question presented [in *Pena*] is whether Congress has waived the Federal Government's sovereign immunity against *awards of monetary damages* [Emphasis sup-

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[2] "On October 15, 1994, the [RSA] arbitration panel issued its final order in which it directed the DVA to turn over to Maryland the operation of the retail store already located at the VAMC, . . ." 98 F.3d 168.

[3] In fact, the federal government in *Pena* did not "contest the propriety of injunctive relief" against it under *Franklin*, but only argued that "the Federal Government's sovereign immunity prohibits *wholesale application of Franklin* to actions against the Federal Government to enforce § 504(a) [Emphasis supplied]." *Pena, Id.* at 2099.

plied]."[4] *Pena, Id.*, 116 S.Ct. at 2095. *Pena* has no application to the case at bar.

B. The Respondents misconstrue the concept of "Remedy," as that term is used by this Court in *Franklin*

Under *Franklin*, the power to grant a remedy involves nothing less than the duty of a federal court "to award appropriate relief in cases brought in our court system." *Franklin, Id.*, 503 U.S. at 74. The failure of federal courts to enforce remedies provided by Congress actually violates the Separation of Powers doctrine "by giving judges the power to render inutile causes of action authorized by Congress through a decision that no remedy is available." *Id.*

Respondents do not attempt to address the authorities cited in the NFB's Petition at 26-28, that strongly support the conclusion that when Congress mandated that disputes under the RSA be resolved by an arbitration panel the Congress *did not* use "arbitration" in a different sense from that employed in other laws in effect at the time of the 1974 Amendments to the RSA. A commitment to arbitration by Congress in 1974 includes a policy judgment that arbitrators are to adjudicate all of the issues of a dispute under 20 U.S.C. § 107d-1, including the determination of a remedy.

Respondents' argument regarding *Franklin* also indirectly raises for the first time the power of a court to review a decision of an arbitrator. Under arbitration law as it clearly existed in 1974, and which the Congress undoubtedly considered when it employed the concept of final and binding arbitration in the 1974 Amendments

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[4] The NFB does not concede that an RSA panel cannot award monetary damages against a federal agency under the Act. Certainly, it could be argued that the Congress has waived sovereign immunity by enacting the RSA. However, the issue of monetary damage relief is not before the Court under the facts of the case at bar.

to the RSA, "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration. . ." *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596 (1960). Judicial review is nevertheless necessary, but "courts have essentially one role—to place government authority behind an award in order to enforce it." *Armco Employees Independent Federation, Inc. v. Armco Steel Co.*, 65 F.3d 492, 495-96 (6th Cir. 1995). The failure of the Court below to enforce an award of an arbitration panel also contravenes the intent of Congress in making every arbitration award under the RSA "subject to . . . review as a final agency action" under the APA. 20 U.S.C. § 107d-2(a). *See Abbott Laboratories, et al. v. Gardner*, 387 U.S. 136, 139-40 (1967) ("the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable interpretation' ").

II. THE BRIEF FOR THE FEDERAL RESPONDENTS SHOWS THERE IS CONFUSION, AND IGNORES CONFLICTS, IN THE FEDERAL COURTS' INTERPRETATION OF THE RANDOLPH-SHEPPARD ACT

Respondents argue that no conflict or confusion exists in the courts below. These attempts to raise new points, within the meaning of this Court's Rule 15.6, are not well taken. In a case ignored by the Respondents, *Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986),[5] an RSA panel awarded $10 million dollars against a federal agency. *Id.*, 403-406. The federal government vigorously contested that award, but it did not question the arbitration panel's authority to make such an award, nor did any of the ten judges of the Federal Circuit in that case question the panel's basic authority to make such an award. The *Texas* decision clearly conflicts with the decisions of the Courts below that an RSA panel "has no remedial powers whatsoever."

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[5] Cited at pp. 4 and 11 of the NFB's Petition and discussed at p. 15 of same.

Respondents dismiss the decision in *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986) as dicta. In fact, the Court in *Weinberger* confronted a fact situation which demanded that it consider carefully the remedial powers of an RSA panel convened to resolve a dispute between an SLA and a federal agency, and its discussion of the remedial powers of such a panel forms an indispensable part of its holding.

Weinberger involved very large contracts between federal agencies and the Burger King and McDonald fast food corporations. *Id.* The Court in *Weinberger*, squarely faced with a challenge to the validity of those contracts, concluded, by specific reference to 20 U.S.C. § 107d-2 (*Id.*, at 109), that there were a wide variety of remedies available by means of arbitration, including even invalidation of those contracts, limitations on making such contracts in the future, and other "prospective relief." *Id.* Far from dicta, a determination of the remedial powers of an RSA panel was a necessary element of the Court's reasoning that enabled the Court to determine that the parties could and must place their dispute, including remedies, before an RSA panel and exhaust their administrative remedies before seeking relief in federal court.

Perhaps most telling, however, the Court below did not dismiss as dicta but instead specifically declined to follow *Weinberger*, on the ground that the District of Columbia Circuit's construction of the RSA failed to give full effect to all of the language of the RSA. *Maryland, Id.*, 98 F.3d at 170. This Court has often granted Certiorari when there is a conflict among the Circuits as to the construction of a statute that impacts on the proper administration of an Act of Congress. *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962) (there was a conflict and "the need for a uniform rule on the point"); *Minnesota Mining Co. v. New Jersey Wood Co.*, 381 U.S. 311, 314 (1965) and *Shapiro v. United States*, 335 U.S. 1, 4 (1948) ("because this conflict involves an important question of statu-

tory construction"); *See also, United States v. Ruzicka*, 329 U.S. 287 (1946).

Respondents seize upon the Eighth Circuit's strained conclusion in *Minnesota Department of Economic Security v. Riley ("Riley II")*, 107 F.3d 648 (8th Cir. 1997), that the decision of the Court below is not in conflict with the Eighth Circuit's decision, without considering the obvious. As noted by the Commonwealth of Virginia, et al., *Amici* Brief, 14-15, in the Eighth Circuit an SLA of a State can have an arbitration award of an RSA panel enforced in Court (107 F.3d at 649), but an SLA in the Fourth Circuit cannot. At minimum, there is confusion in the two Circuits concerning the power of a federal court to enforce an arbitration award of a panel under the Act. In other words, there is a disagreement between the Circuits as to the very basic question of how the RSA is to be enforced in those Circuits, and this Court has granted Certiorari when such a conflict threatens to become a serious hindrance to the effective administration of an Act of Congress. *Rothensies v. Electric Battery Co.*, 329 U.S. 296 (1946).

Respondents dismiss the other cases that conflict with the decision below in a footnote (Respondents' Brief, 12, n.8), without providing any meaningful discussion of the basis for their conclusion. For example, Respondents argue that *Delaware Department of Health & Social Services v. United States Department of Education*, 772 F.2d 1123 (3rd Cir. 1985), is inapposite because it involves on its facts 20 U.S.C. § 107d-2(b)(1).[6] In fact, the *Delaware* decision contains a thoughtful and careful anal-

[6] In so doing, Respondents overlook the fact that the Courts below rely primarily on *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990), which case also involves on its facts 20 U.S.C. § 107d-2(b)(1). In a real sense, however, the Respondents do both the Court and the cause of justice a favor because this underscores as nothing else could the confusion among the Circuits.

ysis of the common underpinnings of panels convened pursuant to both 20 U.S.C. § 107d-2(b)(1) and (b)(2). Based on that analysis, the Court in *Delaware* concluded that because blind vendors are third party beneficiaries of the relationship between the States and the federal government (*id.*, at 1127), arbitration of disputes between SLAs and federal agencies "were included primarily to deal with the disputes which had often arisen in the administration of the Randolph-Sheppard Program when certain federal departments were unwilling to provide sites for blind vendors." *Id.*, at 1129.

CONCLUSION

The serious confusion among the Circuits concerning the Act was captured best by the authors of the Commonwealth of Virginia, et al.'s *Amici* Brief in support of the Petitions herein for Certiorari:

> The current status of the law is that 1) in the Third Circuit (*see Delaware Dept. of Health*), a blind licensee may recover compensatory damages and attorneys' fees in an arbitration against a State licensing agency under § 107d-1(a); 2) in the Eleventh Circuit (*see Nash*)—and probably in the Fourth Circuit, in view of its reliance on *Nash* in the decision below—an RSA arbitration panel may not grant *any* form of relief in an arbitration under the same statute; 3) in the Fourth Circuit (*see* decision below), a § 107d-1(b) arbitration panel has no remedial authority and a district court may not enforce its decision; and 4) in the Eighth Circuit (*see Riley II*) the remedial authority of a § 107d-1(b) arbitration panel is not clear, but it *is* clear that a district court may enter an injunction enforcing a panel's decision; and 5) at least in Colorado (*see Hudson v. Boxer*, 632 F. Supp. 1569 (D. Colo. 1986) [and in Wisconsin, *see Howe v. Bolger*, 35 CCH EPD 34,822 (E.D. Wis. 1984)], blind vendors may obtain a preliminary

> injunction against State officials to maintain the status quo pending arbitration.

Commonwealth of Virginia, et al. Amici Brief, pp. 15-16.

Clearly, the enforceability of the rights of the blind under the RSA varies tremendously with geography. If nothing else, there is a great deal of confusion concerning the meaning of the RSA and, as noted in the NFB's Petition, this Court ought to grant Certiorari just to resolve that confusion. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* 180 (BNA 7th Ed. 1993). Certainly, there "appears" to be a conflict among the Circuits, and such an appearance of a conflict has been the basis in the past of this Court's assertion of Certiorari Jurisdiction. *See Saxbe v. Washington Post Co.,* 417 U.S. 843, 846 (1974) ("an apparent conflict in approach"); *United States v. National Bank of Commerce,* 472 U.S. 713, 719 (1985) ("appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Oregon Dept. of Fish and Wildlife v. Klamath Tribe,* 473 U.S. 753, 764 (1985) ("appeared to conflict in principle").

The Randolph-Sheppard Act creates rights to economic opportunity for a distinctly disadvantaged class in American society. None of the briefs filed in this case, including the Respondents' Brief in Opposition, question the rights defined and declared by Congress in the Randolph-Sheppard Act. However, the Petitions and the briefs filed in this case, including the Respondents' Brief in Opposition, manifest confusion and conflict about the procedure for securing those rights. Blind citizens nationwide, and their patron SLAs in the fifty States, deserve to know from this Court, finally, what the proper procedure is for securing those rights.

Respectfully submitted,

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